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# Estuaries



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# Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Agricultural Stabilization and Conservation Service

#### 7 CFR Part 736

[Amdt. No. 3]

#### Grain Warehouses; Definitions, Financial Requirements and Warehouse Bonds

**AGENCY:** Agricultural Stabilization and Conservation Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The purpose of this rule is to amend the regulations at 7 CFR Part 736 relating to grain warehouses licensed under the United States Warehouse Act to: (1) Add definitions; (2) increase the total net asset requirements; (3) require warehousemen to have and maintain total current assets equal to or exceeding total current liabilities; (4) allow the Secretary to accept a letter of credit for a deficiency in total net assets above the minimum requirement; (5) permit a warehouseman to deposit with the Secretary for the protection of depositors, United States public debt obligations as security in lieu of a bond furnished by a corporate surety; (6) allow a waiver of the requirements for an individual financial statement from a warehouseman wholly-owned by another business entity which other entity is willing to furnish an acceptable financial statement and guarantee the storage obligations of the licensed warehouseman; (7) accept certain appraisals of real and personal property to supplement financial statements; and (8) provide for the acceptance of a continuous form of bond.

**EFFECTIVE DATE:** January 1, 1988.

**FOR FURTHER INFORMATION CONTACT:** R. Ford Lanterman, 202-475-4032.

## SUPPLEMENTARY INFORMATION: Rulemaking Matters

This final rule has been reviewed in conformity with Executive Order 12291 and Departmental Regulation 1512-1 and has been classified as "non-major." This action does not constitute a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures.

Milton J. Hertz, Administrator, ASCS, has determined that this action is not a major rule since implementation will not result in: (1) An annual effect on the economy of \$100 million or more; (2) major increases in costs or prices for consumers, individual industries, Federal, State, or local governments, or a geographic region; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic or export markets.

The information collection requirements proposed by this rule will not become effective until they have been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980. Such approval has been requested and is under consideration.

Comments concerning the information collection requirements contained in these rules may be addressed to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer ASCS/USDA, Washington, DC 20503, Telephone (202) 395-7340.

Milton J. Hertz, Administrator, ASCS, has certified that this action will not have a significant economic impact on a substantial number of small entities because: (1) This action imposes only moderate economic costs on small entities; and (2) the use of the service is voluntary. Therefore, no regulatory flexibility analysis was prepared.

This rule is not expected to have any significant impact on the quality of the human environment. In addition, this action will not adversely affect environmental factors such as wildlife habitat, water quality, or land use and appearance. Accordingly, neither an environmental assessment nor an environmental impact statement is required and none was prepared.

This action will not have a significant impact specifically upon area and community development, therefore review as established by Executive

Order 12291 (February 17, 1981) was not used to assure that units of local government are informed of this action.

## Background

The U.S. Warehouse Act [7 U.S.C. 241 *et seq.*] [the "Act"] provides that warehousemen who apply to the Secretary of Agriculture and who meet certain statutory and regulatory standards may be federally licensed. The primary objectives of the Act are to: (a) Protect producers and others who store their property in public warehouses; (b) assure the integrity of warehouse receipts as documents of title, thereby facilitating trading of agricultural commodities in interstate commerce; and (c) set and maintain a standard for sound warehouse operations.

The Department of Agriculture has sought to attain these objectives by: Research and development of basic standards for good warehousing practices; requiring original and continuing examinations of applicants and licensees; establishing financial and bonding requirements; and establishing licensing and regulatory requirements. Rules and regulations have been promulgated by the Department from time to time, under authority of section 7 U.S.C. 268.

Changes in the economy, governmental administrative policy, grain warehousing industry, and needs of grain warehousemen have necessitated continuous Departmental review of operations and requirements under the Act. A notice of proposed rulemaking was published by the Department on Monday, March 30, 1987, in the *Federal Register* at 52 FR 10104, requesting comments with respect to several proposed changes in the regulations for grain warehouses. The comment period ended on April 29, 1987.

Amendments were proposed which would (1) add definitions, (2) increase the net asset requirements for licensing and continuation of licensing, (3) accept deposit of United States Bonds, Treasury Notes or other public debt obligations in lieu of surety bonds and to accept a continuous form of surety bond, (4) permit acceptance of letters of credit for a deficiency in net assets above the minimum required, (5) accept financial statements of a parent entity for a wholly owned subsidiary under certain conditions, (6) accept appraisals



of land, building and equipment under specified conditions and (7) provide for a continuous license and bond.

Comments were received from five entities. One comment was from a large multi-state grain warehouseman expressing approval of all the proposed changes. The remainder of the comments were from trade associations. Three comments concerned the proposed use of letters of credit and stated that letters of credit are not recognized as insured deposits by the Federal Deposit Insurance Corporation (FDIC). One commentator also stated that the use of the term "unconditional" as used in the proposed regulation is incorrect.

Contrary to the opinion expressed however, letters of credit may be insured by the FDIC if they are the result of a deposit as opposed to a loan. The original intent of the proposed rule was to require that a letter of credit be backed by a deposit of funds and therefore be insured. The final rule is clarified.

One comment addressed the proposed change in the surety bond from a cumulative to a non-cumulative, continuous form. The comment agreed with the need to change this regulation but stated that the proposed bond language did not place the bond and the deposit of government securities on an equal basis. Therefore, the bond language has been clarified to define the surety's maximum and aggregate liability for any and all claims no matter how many years the bond remains in force.

Another trade association expressed approval of the proposal to accept Government Securities in lieu of a surety bond but requested that consideration be given to including the Government Securities as a net asset in the analysis of the financial statement. After due consideration it has been determined that these funds are committed, are not available as working capital and are only available for payment of any indebtedness in the case of failure by the warehouseman.

These securities may also be provided by a third party, therefore, they would not be available to the warehouseman. Generally accepted accounting principles also preclude their usage for the purpose of determining net assets. Accordingly, it has been determined that the bonding provisions of the proposed rule should be adopted. A comment also disagreed with the proposal to increase the net worth requirements. In view of the increasing losses being suffered by depositors in warehouse insolvencies, the Department has determined that the increase in net worth requirements is

prudent for the protection of all depositors. The net asset requirements for Uniform Grain Storage Agreement Warehouses were increased on April 1, 1987, to 25 cents per bushel, \$50,000 minimum with no maximum. Since most Federally licensed warehousemen are approved under the Uniform Grain Storage Agreement they are currently required to meet this requirement. Therefore, it has been determined that this provision of the proposed rule should be adopted as a final rule.

In review of the proposed rule, it was determined that the effect paragraph of the bond had been omitted. That paragraph has been reinstated in the final rule.

#### List of Subjects in 7 CFR Part 736

Definitions, Warehouse licenses, Financial requirements, Warehouse bonds.

#### Final Rule

Accordingly the regulations for grain warehouses, 7 CFR Part 736, are amended as follows:

#### PART 736—GRAIN WAREHOUSES

1. The authority citation for 7 CFR Part 736 continues to read as follows:

Authority: Sec. 28, 39 Stat. 490 (7 U.S.C. 268).

2. Section 736.2 is amended by adding paragraphs (w), (x), (y), and (z) as follows:

#### § 736.2 Terms defined.

(w) *Net assets.* The difference remaining when liabilities are subtracted from allowable assets as determined by the Secretary after review of the warehouseman's financial statement. In determining total net assets, credit may be given for insurable property such as buildings, machinery, equipment, and merchandise inventory only to the extent that such property is protected by insurance against loss or damage by fire, lightning, and tornado. Such insurance shall be in the form of lawful insurance policies issued by insurance companies authorized to do such business and subject to service of process in suits brought in the State in which the warehouse is located.

(x) *Warehouse capacity.* Warehouse capacity is defined as the maximum number of bushels of grain that the warehouse could accommodate when stored in the manner customary to the grain for the warehouse, as determined by the Secretary.

(y) *Current assets.* Assets, including cash, that are reasonably expected to be realized in cash or sold or consumed

during the normal operating cycle of the business or within one year if the operating cycle is shorter than one year.

(z) *Current liabilities.* Those financial obligations which are expected to be satisfied during the normal operating cycle of the business or within one year if the operating cycle is shorter than one year.

3. Section 736.6 is amended by revising paragraphs (d) and (f) and by adding a paragraph (i) to read as follows:

#### § 736.6 Financial requirements.

(d) Each warehouseman conducting a warehouse which is licensed under the regulations in this part, or for which application for such a license has been made, shall have and maintain:

(1) Total net assets liable and available for the payment of any indebtedness arising from the conduct of the warehouse of at least 25 cents multiplied by the warehouse capacity in bushels, however, no person may be licensed or remain licensed as a warehouseman under this part unless that person has allowable net assets of at least \$50,000. (Any deficiency in net assets above the \$50,000 minimum may be supplied by an increase in the amount of the warehouseman's bond in accordance with § 736.14(c) of this part.); and

(2) Total current assets equal to or exceeding total current liabilities or assurance that funds will be available to meet current obligations.

(f) Subject to such terms and conditions as the Secretary may prescribe and for the purposes of determining allowable assets and liabilities under paragraphs (d) and (e) of this section:

(1) Capital stock shall not be considered a liability;

(2) Appraisals of the value of fixed assets in excess of the book value claimed in the financial statement submitted by warehousemen to conform with paragraphs (b) and (c) of this section may be allowed by the Secretary if prepared by independent appraisers acceptable to the Secretary;

(3) Financial statements of a parent company which separately identifies the financial position of a wholly owned subsidiary and which meets the requirements of paragraphs (b), (c), and (d) of this section may be accepted by the Secretary in lieu of the warehouseman meeting such requirements; and



(4) Guaranty agreements from a parent company submitted on behalf of a wholly owned subsidiary may be accepted by the Secretary as meeting the requirements of paragraphs (b), (c), and (d) of this section, if the parent company submits a financial statement which qualifies under this section.

(i) When a warehouseman files a bond in the form of either a deposit of public debt obligations of the United States or other obligations which are unconditionally guaranteed as to both interest and principal by the United States as provided for in § 736.13(c):

(1) The obligation deposited shall not be considered a part of the warehouseman's assets for purposes of § 736.6(d), (1) and (2);

(2) A deficiency in total allowable net and current assets as computed for § 736.6(d), (1) and (2) may be offset by the licensed warehouseman furnishing a corporate surety bond for the difference;

(3) The deposit may be replaced or continued in the required amount from year to year; and

(4) The deposit shall not be released until one year after termination (cancellation or revocation) of the license which it supports or until satisfaction of any claim against the deposit, whichever is later.

Nothing in these regulations shall prohibit a person other than the licensed warehouseman from furnishing such bond or additions thereto on behalf of and in the name of the licensed warehouseman subject to provisions of § 736.13(c).

perform during the period of this bond all obligations of a licensed warehouseman under the terms of the Act and regulations thereunder relating to the above-named products;

Then this obligation shall be null and void and of no effect, otherwise to remain in full force. For purposes of this bond, the aforesaid obligations under the Act and regulations and contracts include obligations under any and all modifications of the Act, the regulations, and the contracts that may hereafter be made, notice of which modifications to the surety being hereby waived.

This obligation shall be and remain in full force and effect for a minimum of one year beginning with the effective date and shall be considered a continuous bond thereafter until terminated as herein provided. The total liability of the surety is limited to the penal amount hereof, for liabilities that accrue during the term hereof.

This obligation shall be and remain in full force and effect from date of issue until one hundred twenty (120) days after notice in writing of cancellation shall have been received by the Secretary from the principal or surety. If said notice shall be given by the surety, a copy thereof shall be mailed on the same day to the principal. Cancellation of this bond and cancellation of any of its provisions shall not affect any liability accrued thereon at the time of said notice or which may accrue thereon during the one hundred twenty (120) days after such notice.

A bond in this form shall be subject to 7 CFR 736.6, and 736.14 through 736.17, and 31 CFR Part 225, or (b) In the form of a certificate of participation in and coverage by an indemnity or insurance fund as approved by the Secretary, established and maintained by a State, backed by the full faith and credit of the applicable State, and which guarantees depositors of the licensed warehouse full indemnification for the breach of any obligation of the licensed warehouseman under the terms of the Act and regulations. A certificate of participation and coverage in such fund shall be furnished to the Secretary annually. If administration or application of the fund shall change after being approved by the Secretary, the Secretary may revoke his approval. Such revocation shall not affect a depositor's rights which have arisen prior to such revocation. Upon such revocation the licensed warehouseman then must comply with paragraph (a). Such certificate of participation shall not be subject to §§ 736.14 and 736.15, or

(c) In the form of a deposit with the Secretary as security, United States, bonds, Treasury notes, or other public debt obligations of the United States or obligations which are unconditionally guaranteed as to both interest and principal by the United States, in a sum equal at their par value to the amount of the penal bond required to be furnished, together with an irrevocable power of

attorney and agreement in the form prescribed, authorizing the Secretary to collect or sell, assign and transfer such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. Obligations posted in accordance with this paragraph may not be withdrawn by the warehouseman until one year after license termination or until satisfaction of any claims against the obligations whichever is later. A bond in this form shall be subject to 7 CFR 736.6 and 736.14 through 736.17 and 31 CFR Part 225.

7. Section 736.14 is amended by revising paragraph (c) to read as follows:

**§ 736.14 Amount of bond; additional amounts.**

(c) In case of a deficiency in net assets above the \$50,000 minimum required under § 736.6(d), (1), there shall be added to the amount of bond determined in accordance with paragraph (a) of this section an amount equal to such deficiency or a letter of credit in the amount of the deficiency issued to the Secretary for a period of not less than two years to coincide with the period of any deposit of obligation under 7 CFR 736.13(c). Any letter of credit must be clean, irrevocable, issued by a commercial bank, payable to the Secretary by sight draft and insured as a deposit by the Federal Deposit Insurance Corporation. If the Secretary, or his designated representative, finds that conditions exist which warrant requiring additional bond, there shall be added to the amount of bond as determined under the other provisions of this section, a further amount to meet such conditions.

8. Section 736.16 is revised to read as follows:

**§ 736.16 New bond required each year.**

A continuous form of license shall remain in force for more than one year from its effective date or any subsequent extension thereof, provided that the warehouseman has on file with the Secretary a bond meeting the terms and conditions as outlined in 7 CFR 736.13. Such bond must be in the amount required by the Secretary and approved by him or his designated representative. Failure to provide or renew a bond shall result in immediate and automatic termination of the warehouseman's license.

**§ 736.7 [Amended]**

4. Section 736.7 is amended by changing "\$25,000" to "\$50,000."

5. Section 736.9(a) is amended by changing "\$25,000" to "\$50,000."

6. Section 736.13 is revised to read as follows:

**§ 736.13 Bond required; time of filing.**

Each warehouseman applying for a warehouse license under the Act shall, before such license is granted, file with the Secretary or his designated representative a bond either:

(a) In the form of a bond containing the following conditions and such other terms as the Secretary or his designated representative may prescribe in the approved bond forms, with such changes as may be necessary to adapt the forms to the type of legal entity involved:

Now, therefore, if the said license(s) or any amendments thereto be granted and said principal, and its successors and assigns operating said warehouse(s), shall faithfully



Signed at Washington, DC, September 29, 1987.

Milton Hertz,

Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 87-22951 Filed 10-2-87; 8:45 am]

BILLING CODE 3410-05-M

## Agricultural Marketing Service

### 7 CFR Part 910

[Lemon Regulation 581]

#### Lemons Grown in California and Arizona; Limitation of Handling

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** Regulation 581 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 265,000 cartons during the period October 4 through October 10, 1987. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

**DATES:** Regulation 581 (§ 910.881) is effective for the period October 4 through October 10, 1987.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 447-5697.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (REA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

This regulation is issued under Marketing Order No. 910, as amended (7

CFR Part 910) regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act"), 7 U.S.C. 601 through 674, as amended. This action is based upon the recommendation and information submitted by the Lemon Administrative Committee and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the marketing policy for 1987-88. The committee met publicly on September 29, 1987, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and recommended by a unanimous vote a quantity of lemons deemed advisable to be handled during the specified week. The committee reports that the market is good for large sized lemons, poor for smaller sizes.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice, and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

#### List of Subjects in 7 CFR Part 910

Marketing agreements and orders, California, Arizona, Lemons.

For the reasons set forth in the preamble, 7 CFR Part 910 is amended as follows:

#### PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR Part 910 continues to read as follows:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 910.881 is added to read as follows:

#### § 910.881 Lemon regulation 581.

The quantity of lemons grown in California and Arizona which may be

handled during the period October 4 through October 10, 1987, is established at 265,000 cartons.

Dated: September 30, 1987.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 87-22949 Filed 10-2-87; 8:45 am]

BILLING CODE 3410-02-M

### 7 CFR Part 920

#### Kiwifruit Grown in California; Changes in Quality and Reporting Requirements

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This action, unanimously recommended by the California Kiwifruit Administrative Committee (the committee), tightens the minimum quality requirements for kiwifruit to provide better quality fruit to the marketplace and help improve sales and returns to growers. Export markets are particularly sensitive to lower quality fruit. In order to facilitate compliance with order provisions this action requires handlers to inform the committee whenever fruit is returned to growers. The committee needs to be able to identify sources of cull fruit to prevent its being sold in established markets. These actions are not expected to short the market, as ample supplies of good quality kiwifruit are expected to be available from the 1987 crop to meet market needs. The committee works with the USDA in administering the marketing order program for California kiwifruit.

**EFFECTIVE DATE:** October 5, 1987.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V Division, AMS, USDA, P.O. Box 96458, Room 2523-S, Washington, DC 20090-6458; telephone 202-447-5697.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Order No. 920 (7 CFR Part 920), regulating the handling of kiwifruit grown in California.

This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 through 674), hereinafter referred to as the Act.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the information collection requirements included in this rule were submitted for approval to the Office of Management and Budget (OMB). The requirements



have been approved by OMB and assigned OMB No. 0581-0149.

This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act and rules issued thereunder are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 65 handlers of kiwifruit subject to regulation under the California kiwifruit marketing order and approximately 1,100 producers in California. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than \$100,000, and small agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. The great majority of these handlers and producers may be classified as small entities.

California kiwifruit are grown throughout the entire State of California. Kiwifruit shipments in 1986-87 totaled 6,525,000 trays and tray equivalents. Shipments in 1987-88 are expected to be 10 to 20 percent greater. Most of the crop is marketed fresh.

A proposed rule inviting comments on this action was published in the August 3, 1987, *Federal Register* (52 FR 28725). Interested persons were given until August 18, 1987, to file written comments. One comment, endorsing the proposal and urging its swift approval, was received from the committee.

The regulatory action in this instance will up-grade the quality requirements for kiwifruit and develop a way for the committee to gather information on the movement of fruit within the production area. Current quality requirements specify that California kiwifruit must grade at least 85 percent U.S. No. 2 provided that no more than 8 percent be allowed for defects other than badly misshapen fruit. Under the standards for U.S. No. 2 fruit, such defects may constitute "serious damage." U.S. No. 2 fruit must contain at least 6.5 percent

soluble solids, unless otherwise specified. Since, under current regulations, kiwifruit must grade at least 85 percent U.S. No. 2, badly misshapen fruit is limited to 15 percent. Included in the 8 percent allowed for serious damage defects under the standards for U.S. No. 2 fruit is not more than 4 percent for sunscald, insects, internal breakdown or decay, and in this latter amount not more than 1 percent for fruit affected by internal breakdown or decay.

Export markets demand high quality fruit, although lower grade shape requirements are acceptable. However, the existing tolerances for defects have led to problems involving the breakdown of fruit both in storage and during shipment to export markets. This has caused some domestic marketing problems and aggravated the existing image problem for California kiwifruit in certain countries, notably Japan. This action will require that a lot of kiwifruit contain not more than 8 percent defects causing "damage" other than shape, and will result in requiring U.S. No. 1 grade fruit except for the shape requirement which will continue to be that specified for U.S. No. 2 grade. This is because, under the grading standards, No. 2 grade allows for "serious damage". Since the U.S. No. 2 shape requirements have not been a problem in domestic and export markets, tightening the grade requirements for shape to U.S. No. 1 is not necessary at this time. Tightening the requirements to permit only those defects causing damage will serve to help provide better quality fruit and thus enhance the image of California kiwifruit. This will tend to increase domestic and export sales, thus helping growers to move their crop at a profit.

This action also establishes a committee recommendation to require a mandatory 6.5 percent soluble solids content. The current grading standards require 6.5 percent "unless otherwise specified." Fruit harvested when the sugar (soluble solids) content is below 6.5 percent indicates a less mature product, and the fruit may not ripen properly. Because some packers are harvesting and packing fruit below the 6.5 percent level, the committee believes this action is necessary to maintain a high quality product. Requiring a 6.5 percent soluble solids content in kiwifruit will assure a sweet, mature product that should prompt repeat sales by consumers.

The committee also recommended that a form be sent to the committee office by handlers returning fruit to their growers. This will enable the committee to gather information on the movement of cull fruit in the production area.

The committee believes that peddlers of cull fruit are buying the culls and selling them in established markets. This is a very disruptive practice that adversely affects the markets for all kiwifruit. When cull fruit is sold in established markets, it puts downward pressure on growers prices for all fruit, including that of good quality, and tends to bring about disorderly marketing conditions. Requiring handlers to report returned fruit should help compliance by pinpointing potential sources of cull fruit entering established markets. The necessary information will be minimal and will be recorded on a new committee form. The total time required to fill out the form should not exceed five minutes per form.

Although this action will upgrade the quality and increase the reporting requirements for kiwifruit shipped from the production area, regulatory exemptions will continue in effect. For example, any handler may handle, other than for resale, up to, but not to exceed 200 pounds net weight of kiwifruit per day without regard to the requirements of the handling regulation. In addition, shipments for charity, relief, and commercial processing are exempt from the grade, size, container, and inspection requirements of the order and the handling regulation. Reporting provisions of the handling regulation apply to such shipments.

The actual cost to handlers for complying with these changes cannot be precisely determined, but it is expected to be minimal. On the other hand, the increased returns expected from both domestic and export sales of better quality kiwifruit and better compliance controls on cull fruit movement should more than offset the anticipated slight increase in handler costs in meeting the requirements. On the basis of the foregoing, the impact of these changes on growers and handlers is expected to be beneficial, and the Administrator of AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

Therefore, after consideration of the information and recommendation submitted by the committee, the information in the proposal, and other information, it is hereby found and determined that this action, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is further found that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because: (1) The harvest, packing, grading, and shipping



of the 1987 crop is expected to start in early October, and it is important that this action be effective as soon as possible; (2) this action is based upon the unanimous recommendation of the committee at a public meeting; (3) the provisions in this final rule are the same as those contained in the proposal (except for a minor clarification) which was published in the *Federal Register* on August 3, 1987; and (4) handlers are prepared to conduct their operations in accordance with this rule and do not require any additional time for preparation.

#### List of Subjects in 7 CFR Part 920

Marketing agreements and orders, Kiwifruit, California.

For the reasons set forth in the preamble, 7 CFR Part 920 is amended as follows:

#### PART 920—KIWIFRUIT GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 920 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 920.302 is amended by revising paragraph (a)(1); redesignation (a)(4) as (a)(5), redesignating (a)(3) as (a)(4), and adding a new (a)(3) to read as follows:

#### § 920.302 Grade, size, pack, and container regulations.

(a) \* \* \*

(1) *Grade requirements.* Fresh shipments of kiwifruit shall grade at least 85 percent U.S. No. 2: *Provided*, That not more than 8 percent shall be allowed for defects other than shape causing damage, including not more than 4 percent for defects other than shape causing serious damage, and including in this latter amount not more than 1 percent shall be allowed for fruit affected by internal breakdown or decay.

(3) *Maturity requirements.* Such kiwifruit shall have a minimum of 6.5 percent soluble solids at the time of inspection.

3. Section 920.160 is amended by adding a new § 920.160(c) as follows:

#### § 920.160 Reports.

(c) *Handler report of returned fruit.* After fruit is returned to a grower, each handler shall file with the committee, no later than five days from the date the fruit is returned, or such other time as the committee may establish, a Return Receipt of Kiwifruit to Grower Form.

Dated: September 30, 1987.

Robert C. Keeney,  
Deputy Director, Fruit and Vegetable  
Division, Agricultural Marketing Service.  
[FR Doc. 87-22973 Filed 10-2-87; 8:45 am]  
BILLING CODE 3410-02-M

#### 7 CFR Part 967

#### Celery Grown in Florida; Handling Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

**SUMMARY:** This action establishes the quantity of Florida celery which handlers may market fresh during the 1987-88 season at 6,789,738 crates or 100 percent of producers' Base Quantities. The action is intended to provide consumers with adequate supplies and lend stability to the industry.

**EFFECTIVE DATES:** August 1, 1987, through July 31, 1988.

**FOR FURTHER INFORMATION CONTACT:** Ronald L. Cioffi, Chief, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: 202/447-5697.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601 through 674), as amended, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities on their own behalf. Thus, both statutes have small entity orientation and compatibility.

It is estimated that seven handlers of celery under the marketing order for Florida celery will be subject to regulation during the course of the current season. There are 13 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2 (1985)) as those having average annual gross revenues for the last three

years of less than \$100,000, and small agricultural service firms have been defined as those whose gross annual receipts are less than \$3,500,000. Some handlers and producers of Florida celery may be classified as small entities.

The final rule limits the quantity of Florida celery which handlers may purchase from producers and ship to fresh markets during the 1987-88 season to 6,789,738 crates. This Marketable Quantity is about 18 percent more than the approximately 5.75 million crates expected to be marketed fresh during the 1986-87 season and about 25 percent more than the average number of crates marketed fresh during the 1981-82 through 1985-86 seasons. It is expected that the 6,789,738-crate Marketable Quantity will be above actual production and shipments for the 1987-88 season. Thus, the 6,789,738-crate Marketable Quantity is not expected to restrict the amount of Florida celery which growers produce or the amount of celery which handlers ship.

Based on the above, the Administrator of the AMS has determined that this final rule will not have a significant economic impact on a substantial number of small entities.

Notice of this action was published in the *Federal Register* on July 20, 1987 (FR 52 27205). Written comments were invited until August 19, 1987. None were received.

This final rule is issued under Marketing Agreement No. 149 and Marketing Order No. 967, both as amended, regulating the handling of celery grown in Florida. The marketing agreement and order are effective under the Act. The action is based upon the recommendation and information submitted by the Florida Celery Committee and upon other available information.

The committee met on May 20, 1987, and recommended a Marketable Quantity of 6,789,738 crates of fresh celery for the 1987-88 marketing year beginning August 1, 1987. Additionally, a Uniform Percentage of 100 percent was recommended which would allow each producer registered pursuant to § 967.37(f) of the order to market 100 percent of such producer's Base Quantity. These recommendations were based on an appraisal of expected supply and prospective market demand.

This recommendation encourages Florida celery growers to assume the risks of planting celery by placing a ceiling on the amount of Florida celery which may be shipped to fresh markets and helps to provide consumers with an adequate supply. However, as in past seasons, the limitation on the quantity of



Florida celery handled for fresh shipment is not expected to restrict the quantity of Florida celery actually produced or shipped to fresh markets, since production and shipments are anticipated to be less than the allotment.

As required by § 967.37(d)(1) of the order, a reserve of 6 percent of the 1986-87 total Base Quantities is authorized for new producers and for increases by existing producers for the 1987-88 season. However, there were no applications for new or additional base submitted for the 1987-88 season.

After consideration of all relevant matter presented, the information and recommendations submitted by the committee, and other available information, it is found that the rule as hereinafter set forth will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is hereby found that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because: (1) This action applies to all Florida celery handled by handlers during the 1987-88 crop year, which began August 1, 1987, and (2) handlers are aware of this action, which was recommended by the Committee at a public meeting, and need no additional time to comply with the requirements.

#### List of Subjects in 7 CFR Part 967

Marketing agreements and orders, Celery, Florida.

For the reasons set forth in the preamble, 7 CFR Part 967 is amended as follows:

#### PART 967—CELERY GROWN IN FLORIDA

1. The authority citation for 7 CFR Part 967 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

#### Subpart—Rules and Regulations

2. Add a new § 967.323 under Subpart—Rules and Regulations to read as follows:

§ 967.323 Handling regulation, Marketable Quantity, and Uniform Percentage for the 1987-88 season beginning August 1, 1987.

(a) The Marketable Quantity established under § 967.36(a) is 6,789,738 crates of celery.

(b) As provided in § 967.38(a), the Uniform Percentage shall be 100 percent.

(c) Pursuant to § 967.36(b), no handler shall handle any harvested celery unless it is within the Marketable Allotment of a producer who has a Base Quantity and such producer authorizes the first handler thereof to handle it.

(d) As required by § 967.37(d)(1) a reserve of 6 percent of the total Base Quantities is hereby authorized for:

- (1) New producers and
- (2) Increases for existing Base Quantity holders.

(e) Terms used herein shall have the same meaning as when used in the said marketing agreement and order.

Dated: September 30, 1987.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 87-22950 Filed 10-2-87; 8:45 am]

BILLING CODE 3410-02-M

#### FARM CREDIT ADMINISTRATION

##### 12 CFR Part 624

#### Farm Credit System Regulatory Accounting Practices; Temporary Regulations

**AGENCY:** Farm Credit Administration.

**ACTION:** Final rule with request for comments.

**SUMMARY:** The Farm Credit Administration (FCA), by the FCA Board, adopts a final regulation relating to the retirement of stock of Farm Credit System (System) institutions operating under regulatory accounting practices (RAP). The final regulation prohibits a System institution from retiring stock or participation certificates in accordance with RAP when the net worth of such institution reaches zero in accordance with generally accepted accounting principles (GAAP) and/or, in the case of a System bank, when that bank is unable to meet its statutory and regulatory requirements to have sufficient collateral on hand at the time of issuance of any consolidated or Systemwide securities in the national money markets.

**DATES:** The final regulation was effective September 22, 1987. Written comments must be received on or before November 2, 1987.

**ADDRESS:** Submit comments on the final regulation in writing (in triplicate) to Anne E. Dewey, Acting General Counsel, Farm Credit Administration, McLean, VA 22102-5090. Copies of all communications received will be available for examination by interested parties in the Office of the General Counsel, Farm Credit Administration.

**FOR FURTHER INFORMATION CONTACT:** John Barkell, Assistant Chief, Financial Analysis and Standards Division, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090, (703) 883-4495.

**SUPPLEMENTARY INFORMATION:** At a special meeting on September 22, 1987, the FCA Board adopted an amendment to the FCA regulations implementing the Farm Credit Act Amendments of 1986 (1986 Amendments), Pub. L. 99-509, relating to the use of RAP by System institutions and the reporting and disclosure requirements in accordance with RAP.

The RAP regulations were published in the *Federal Register* on December 24, 1986 (51 FR 46597), and amended on January 26, 1987 (52 FR 2670). The public was given until February 24, 1987, to submit comments on the regulations. A public hearing on the regulations was held at FCA offices in McLean, Virginia on February 27, 1987. The FCA Board responded to one matter raised by the comments relating to use of RAP by Federal land bank associations (FLBA) and adopted an amendment to the RAP regulations at its special meeting on April 17, 1987. The amendment was published in the *Federal Register* on April 23, 1987 (52 FR 13428). The FCA is in the process of reviewing the remainder of the comments and will act on and publish responses to those comments shortly. Due to the financial condition of certain System institutions, the FCA Board at its special meeting of September 22, 1987, concluded that it must take immediate action relating to the retirement of stock and participation certificates by institutions using RAP.

The current RAP regulations authorize System banks and production credit associations (PCAs) to use RAP to amortize a portion of their provisions for loan losses and banks to amortize a portion of their interest costs over a period not to exceed 20 years, provided the institutions meet the conditions set forth in the regulations. The existing regulation authorizes System banks and PCAs which have stock and participation certificates with a book value less than par or face amount in accordance with GAAP to retire such equities at par or face amount as long as the book value is equal to or greater than par or face amount in accordance with RAP and other regulatory criteria are satisfied. 12 CFR 624.105. In addition, if a Federal land bank (FLB) is retiring its stock at par in accordance with RAP, the FLBAs which own the FLB may use RAP to value their investment in the FLB as necessary to maintain the book value of the FLBA's stock or participation certificates at par or face amount. 12 CFR 624.104.

Generally, a financially deteriorating System bank would exhaust its collateral available for supporting the issuance of consolidated or Systemwide



obligations and be precluded from issuing securities in the national money markets before its net worth reached zero under GAAP or through the use of RAP. However, several System banks have recently adopted collateral sharing agreements which enable them to continue to issue securities in the national money markets and to continue operations, including retiring borrower stock and participation certificates in the normal course of business. Because a bank may continue issuing securities based on collateral transferred from other banks under such agreements, it is possible for an institution to reach the point of operating with zero or less net worth under GAAP and have positive net worth under RAP. This condition and the financial condition of certain System institutions requires that the FCA must now consider whether an institution should be permitted to continue to retire stock or participation certificates when its net worth reaches zero under GAAP. To address this issue, the FCA Board amends the regulation at 12 CFR 624.105 relating to stock retirement to make clear that an institution may not use RAP to retire stock or participation certificates at par or face amount when its net worth reaches zero in accordance with GAAP.

The primary purpose of RAP was to enable a System institution to spread its high financing costs and/or loan losses over a longer period (up to 20 years) in order to give the institution time to correct its financial problems. By amortizing these costs, the institution would be paying for part of these costs from future earnings. However, in order for an institution to accomplish this process successfully it must operate in a manner that preserves its viability in order to achieve those future earnings.

The FCA Board determined that retiring stock or participation certificates when an institution reaches zero net worth under GAAP threatens the viability of that and other System institutions, constitutes an unsafe and unsound practice, and is a result not intended by the 1986 Amendments. The FCA Board reasoned that if an institution continues to dissipate its assets through stock retirement when its net worth has reached zero under GAAP, that action increases the likelihood that the institution will not be able to meet its obligations as they become due and increases the need for the institution to call on other System institutions under loss-sharing arrangements or statutory provisions to meet such obligations. The eventual consequences could have a negative impact on the ability of the System as a

whole to continue to obtain funds in the national money markets.

The FCA Board concluded that the 1986 Amendments did not intend to authorize the use of RAP by System institutions in a manner that may endanger the financial viability of the institution. H.R. Rep. No. 967, 99th Cong., 2d Sess. 6-8 (1986). The 1986 Amendments did not alter an institution's responsibility to conduct operations in a safe and sound manner nor authorize the use of RAP to the detriment of the institution's viability. Congress made clear that System institutions should follow GAAP and only use RAP for a limited period to lessen the impact of high borrowing costs and loan losses. *Id.* at 6-8. The FCA must continue to take appropriate regulatory and enforcement actions to insure that an institution does not use RAP in a manner that threatens the institution's financial viability. H.R. Rep. No. 1012, 99th Cong., 2d Sess. 230 (1986).

The amendment is issued with an immediate effective date. Because of the financial condition of certain System institutions, the FCA Board has determined that the Board must take immediate action.

Therefore, for good cause and in accordance with 5 U.S.C. 553 (b) and (d), prior public comment and a delay in the effective date are impracticable, unnecessary, and contrary to the public interest. For the same reasons, the FCA Board has determined, in accordance with 12 U.S.C. 2252(b), that an emergency exists that justifies publication of this amendment to the regulations without prior review by the appropriate congressional committees. As noted above, the public will have 30 days to submit written comments to the FCA after publication of the final regulation.

#### List of Subjects in 12 CFR Part 624

Accounting, Agricultural, Banks, Banking, Credit, Rural areas.

As stated in the preamble, Chapter VI, Title 12, Code of Federal Regulations is amended as follows:

#### PART 624—[AMENDED]

1. The authority citation for Part 624 continues to read as follows:

Authority: 12 U.S.C. 2001, 2014, 2073, 2093, 2122, 2159, 2205, 2254. Pub. L. 99-509.

2. Section 624.105 is amended by adding the following to the end of the section to read as follows:

#### § 624.105 Retirement of equities.

\* \* \* \* \*

Notwithstanding the provisions of paragraph (a) or (b), an institution shall cease retirement of stock and participation certificates when the net worth of the institution is zero or less as determined in accordance with GAAP. In addition to the requirements of the preceding sentence, a System bank shall cease such equity retirements when the bank is unable to meet statutory collateral requirements established in section 4.3(c) of the Act and regulatory requirements of Part 615, Subpart B—Collateral.

David A. Hall,

Secretary, Farm Credit Administration Board.

[FR Doc. 87-23026 Filed 10-1-87; 2:30 pm]

BILLING CODE 6705-01-M

## DEPARTMENT OF THE TREASURY

### Customs Service

#### 19 CFR Part 113

[T.D. 87-124]

#### Customs Regulations Amendment Relating to Carrier Liabilities for Unlawful Lading, Exportation or Disposition of Export-Controlled Merchandise

AGENCY: U.S. Customs Service, Treasury.

ACTION: Final rule.

**SUMMARY:** This document amends the Customs Regulations to provide for the assessment of liquidated damages under the international carrier's bond for unlawfully lading, exporting, or disposing of merchandise which is subject to the export control laws. Under the new bond provision, Customs would demand the redelivery of merchandise which has been seized or detained for violations of export control laws. Customs would also demand the redelivery of merchandise where reasonable cause exists to believe it was exported in violation of the export control laws, but which is still in the carrier's possession on the date of the demand for redelivery. Failure to comply with these demands would result in the assessment of liquidated damages in an amount equal to three times the value of the merchandise that is not redelivered. This amendment is necessary for more effective enforcement of the export control laws.

**EFFECTIVE DATE:** November 4, 1987.

**FOR FURTHER INFORMATION CONTACT:** Susan Terranova, Entry Procedures and Penalties Division (202-566-8317), or for bond information, William Lawlor,



Carriers Drawback and Bonds Division (202-566-5856).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Export Administration Regulations continued in title 15, Code of Federal Regulations, Parts 368 through 399 (15 CFR Parts 368 through 399), and the International Traffic in Arms Regulations found in Title 22, Code of Federal Regulations, Parts 120 through 130 (22 CFR Parts 120 through 130), provide for sanctions in the event that export-controlled merchandise is exported or attempted to be exported without a valid license issued by either the Department of Commerce or the Department of State. Among these sanctions are the issuance of monetary penalties against those responsible for the illegal attempted or completed exportation, seizure and forfeiture of the merchandise involved, and subsequent denial of export privileges. In addition, Title 22, United States Code, section 401 (22 U.S.C. 401), provides for the seizure and detention of any vessel, vehicle or aircraft which has been or is being used in exporting or attempting to export munitions of war or other export-controlled merchandise. Also, Title 18, United States Code, section 549 (18 U.S.C. 549), provides for criminal penalties for unlawfully removing any merchandise from Customs custody.

Customs has been delegated the authority to enforce the Export Administration Regulations and the International Traffic in Arms Regulations pursuant to 15 CFR 386.8 and 22 CFR 127.4, respectively. Under this authority Customs may demand, pursuant to 15 CFR 386.9, the redelivery or retention of merchandise which is known or suspected to be in violation of the export control regulations.

Customs also has the authority to enforce the export control regulations by virtue of the authority granted the Secretary of the Treasury, pursuant to 22 U.S.C. 401, to seize and forfeit illegal exportations of war materials and other articles, as well as the conveyances used to export the articles. Also, under section 113 of the Export Administration Amendments Act of 1985 (Pub. L. 99-64), effective July 12, 1985, Customs was given additional authority to enforce the export control regulations.

Customs has been enforcing the export control laws and regulations under its Operation Exodus program. During the past two years, however, Customs has become aware that some carriers are exporting detained or seized merchandise, despite the presence of warning labels on the merchandise

indicating that it is under Customs seizure or detention, and despite notification to the carrier management of the detention or seizure. There have also been instances where carriers have not complied with Customs demand to redeliver or retain already exported merchandise subsequently found or suspected to be in violation of the export control laws, even though it is still in the carriers' possession.

Although the carriers' action may subject the conveyance to seizure and forfeiture under 22 U.S.C. 401 for its use in the illegal exportation, Customs views this as a drastic remedy which would entail much time and resources expended in effecting the seizure. Instead, it is believed that seeking liquidated damages under the international carrier's bond for exportations in violation of the export control laws would be more expeditious, effective, and less of a drain upon Customs resources. Also, this sanction is within Customs control and can be used for every transgression, whereas a seizure action would require the U.S. Attorney to institute legal proceedings, which is very time-consuming.

The provisions of the international carrier's bond are contained in § 113.64, Customs Regulations (19 CFR 113.64). In § 113.64, however, there is no existing provision setting forth liquidated damages for illegal exportations of export-controlled merchandise. Customs has the authority to enact such a provision by virtue of section 623(a), Tariff Act of 1930, as amended (19 U.S.C. 1623(a)), which provides that "In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce." Pursuant to 15 CFR 386.8 and 22 CFR 127.4, Customs is authorized to enforce the export control laws and regulations. Under the authority of 19 U.S.C. 1623(a), Customs may therefore require a bond to assure compliance with these laws and regulations.

In response to this situation Customs published a notice in the *Federal Register* on May 22, 1986 (51 FR 18801), proposing to amend Part 113, Customs Regulations (19 CFR Part 113), by adding a provision to the international carrier's bond that would provide for the assessment of liquidated damages for illegal exportations under the export

control laws. This would be accomplished by adding a paragraph to § 113.64 that would require the carrier to redeliver to Customs, within 30 days after a demand for redelivery: (1) Illegally disposed of, loaded or exported merchandise that has been placed under seizure or detention; and/or (2) merchandise which has been exported and is subsequently found or suspected to be in violation of the export control laws, but which is still in the carrier's possession. Under the proposal, demand for redelivery would be made within 20 days of Customs discovery of the unlawful or suspected unlawful disposition or exportation. Any demand under this proposed paragraph would specify the terms and conditions of compliance. If the carrier fails to comply with the redelivery notice, it would be liable for liquidated damages in an amount equal to three times the value of the merchandise that is not redelivered.

##### Discussion of Comments

A discussion of the comments received in response to the proposal follows:

*Comment:* A demand for redelivery issued 20 days after discovery of export control law violations would be received by the carrier after the merchandise had left its possession. Also, the carrier would have difficulty redelivering merchandise within 30 days because of distances to be covered or possibly because of conflicting laws in a foreign country.

*Response:* We agree that the 20-day period in which Customs would notify the carrier to redeliver the merchandise is too long and could result in notification to the carrier after the merchandise has been released into the foreign commerce. The final rule has been modified to allow only a 10-day period in which Customs must issue the demand for redelivery. This 10-day period is necessary for Customs to investigate the matter to determine whether an export violation has occurred and that a notice of redelivery should be issued.

With respect to the comments opposing the 30-day redelivery period as insufficient to allow for the redelivery in many cases, we note that, as in other violations in which redelivery is ordered, the district director may grant an extension of the redelivery period upon the petitioner's request if warranted. In most cases, however, we believe the 30-day period is sufficient to allow for redelivery.

As to the comments noting that in certain cases timely redelivery may not be possible due to foreign or



international laws which prevent the removal of the merchandise from the carrier or from the foreign jurisdiction, we note that in this situation the petitioner would have to satisfy Customs that the failure to redeliver was beyond its control. This would be a factor Customs would consider in deciding whether to grant relief from a liquidated damages claim.

*Comment:* Allowing Customs to order redelivery of merchandise that "may have been" exported in violation of export control laws is too lenient a standard and may result in redelivery of merchandise exported legally.

*Response:* Because of these comments, proposed § 113.64(e)(2) has been modified to make the basis of a demand for redelivery a reasonable cause to believe that the export control laws have been violated. That will clarify the limits of Customs authority and will bring the regulation into conformity with 15 CFR 386.9(b) and with general customs law.

*Comment:* This proposal would impose burdens on carriers without statutory authority.

*Response:* We disagree. As stated in the preamble to this document, 19 U.S.C. 1623(a) provides that "In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation, or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce." The Secretary of the Treasury and Customs have been authorized to enforce the export control laws and regulations pursuant to 22 U.S.C. 401. Included among the Export Administration Regulations which Customs is authorized to enforce is 15 CFR 386.9, which provides for the return or unloading and holding of merchandise where there is reasonable ground to believe that a violation has occurred or will occur. Customs may therefore institute a bonding program to assure compliance with this regulation as well as to protect its forfeiture under 22 U.S.C. 401.

*Comment:* This amendment is unnecessary because illegal exportation of export-controlled merchandise is not a problem. If the problem does exist, it is because Customs allows seized merchandise to remain on the carrier's premises.

*Response:* Customs officers have determined that the problem is

prevalent among air carriers in the New York and Los Angeles areas and that instances have occurred at other ports. The frequency of occurrences is apparently increasing.

Merchandise is left at the carrier's premises to avoid the costs and delay that removing it to Customs seizure facilities would entail. Seized export-controlled merchandise is frequently released upon the obtaining of a proper license and payment of an amount demanded in mitigation of the forfeiture. Movement of the merchandise after release is both easier and quicker if the merchandise has not been removed to a Customs seizure facility. The costs of the seizure to the shipper are also likely to be less.

*Comment:* Requiring a carrier to redeliver merchandise will force it to use space on its conveyance that otherwise could have been used to transport something for a paying customer. This lost business amounts to an unconstitutional taking of property from the carrier without compensation. This is particularly onerous where there may be no fault on the carrier's part for the export control law violation.

*Response:* Loss of profits which may result from a carrier using space on a conveyance to redeliver merchandise is not a "taking of property" as that term is used in constitutional law. (See *Briggs & Stratton Corp. v. Baldrige*, 539 F. Supp. 1307 (1982), where a taking argument under the Export Administration Act was rejected by the court on the grounds that a loss of profits unaccompanied by any physical restriction on property is not a taking). Assuming arguendo that expectation of profits from the operation of a conveyance is property, requiring a carrier to redeliver merchandise is not a taking of that property. As to the argument that requiring a carrier to redeliver merchandise is unfair when the carrier is not at fault, Customs cannot allow any party to an export control law violation to relieve itself of liability by claiming it was not its responsibility to see that laws were upheld. To accept such a claim would make enforcement impossible. Carriers can conduct their business relationships in such a way as to reduce the chance of participating in an export control law violation, and we do not believe it is unfair to expect them to do so.

*Comment:* The proposed rule should not be aimed at carriers because it is not the carrier that is responsible for obtaining export licensing or for giving an accurate shipper's export declaration.

*Response:* We do not believe that export control laws are confined to regulating the shipper. Carriers are also

subject to the statutory and regulatory schemes in place; i.e.: 22 U.S.C. 401 which provides for the forfeiture of transporting conveyances and 15 CFR 386.8 which provides for the search, seizure and unloading of conveyances and for the return by the carrier of shipments that have been exported despite notice that an inspection is to be made. Likewise, 15 CFR 386.9 provides for the redelivery of merchandise by an exporting carrier or any person in possession or control of the merchandise when there exist reasonable grounds to believe that a violation of the Export Administration Regulations has occurred or will occur. These provisions are not gratuitous. Carriers are as legitimate a target of export control enforcement as shippers of the merchandise.

*Comment:* Carriers may not be adequately warned of seized merchandise if notice of the seizure is limited to labels on the merchandise.

*Response:* In addition to placing seizure labels on the violative merchandise, Customs notifies the carrier management that the merchandise is under seizure and may not be removed from the carrier. This notification is most often telephonic, given the fact that time is of the essence in many of these cases since the carrier may depart at any point. We believe that the notification provided the carriers is appropriate.

It also should be noted that the notification to the carrier provided by Customs is, in most cases, in addition to the notification the carrier receives from the exporter of record. Customs notifies the carrier as an added precaution against its removal of the merchandise under seizure or detention. Thus, in most cases the carrier receives ample notification of the seizure or detention.

*Comment:* The liquidated damages provision is in essence a penalty and should be treated as such. The primary function of a customs bond is to protect the revenue, and liquidated damages serve no punitive or deterrent effect. Also, there are other Customs Regulations available for amendment to correct any perceived problems with violations of export control laws.

*Response:* We disagree that the liquidated damages provision in the carrier's bond is in essence a penalty and that liquidated damages are intended to protect the revenue only, rather than serving a deterrent effect. The carrier's bond is a contract between the carrier and the Customs. As with any other contract, damages will result for any violation of the contract. The damages set under the contract are



designed to both ensure compliance with its terms and to compensate the aggrieved party for any violation. The amendment to the carrier's bond providing for liquidated damages for violations concerning export-controlled merchandise accomplishes both of these objectives.

We also disagree with the comment that it would be more appropriate to amend Parts 4, 18 and 113, Customs Regulations, rather than the carrier's bond to ensure the carrier's compliance with the export control laws. It is administratively easier for Customs to have the new liquidated damages provision in one place—the bond—rather than to amend different Customs Regulations to provide for the same thing. Also having the provision in the bond itself would enhance enforcement efforts since it makes compliance with the export control regulations by the carrier a condition of the bond and therefore enforceable under the bond contract without having to resort to Customs or other agencies' regulations. Furthermore, it should be noted that Parts 4 and 18, Customs Regulations, for the most part concern importations into the U.S. It would be confusing to include this one provision dealing with exportations in these regulations.

Amending the international carrier's bond is also easier for the carriers since, to understand their obligations with respect to export-controlled merchandise, they would have to refer only to the provisions of their own bond, rather than to an agency's regulations.

**Comment:** Liquidated damages in an amount three times the value of the merchandise not redelivered is excessive. Damages should be assessed in an amount based on what the carrier receives in payment for transporting the merchandise. Also, the amendment should provide for mitigation.

**Response:** The purpose of liquidated damages under bonds is to recompense the Government for the damage it has suffered through failures to meet the obligations of the bonds. The measure of liquidated damages to be assessed for a failure to redeliver export-controlled merchandise is the damage suffered by the Government and the interest of the carrier in the cargo or the fault behind the failure to redeliver. We find that three times the value of merchandise not returned is not excessive for the damage that the Government would suffer to its export control program by a failure to redeliver.

Inasmuch as 19 U.S.C. 1623 allows for the cancellation of charges against a bond caused by breach of a condition upon payment of a lesser sum deemed sufficient, it is not necessary to provide

for mitigation in the rule. It is to be expected that guidelines will be formulated and implemented for these liquidated damages as they have been for other liquidated damages provisions.

After careful analysis of all the comments and further review of the matter, it has been decided to adopt the proposal with the modifications discussed. This amendment is necessary for more effective enforcement of the export control laws.

#### Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

#### Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

#### Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

#### List of Subjects in 19 CFR Part 113

Carriers, Exports, Bonds.

#### Amendment to the Regulations

Part 113, Customs Regulations (19 CFR Part 113), is amended as set forth below.

#### PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 continues to read as follows:

**Authority:** 19 U.S.C. 66, 1623, 1624. Subpart E also issued under 19 U.S.C. 1484.

2. Section 113.64 is amended by adding a new paragraph (e) to read as follows:

#### § 113.64 International carrier bond conditions.

\* \* \* \* \*

(e) *Unlawful disposition.* (1) Principal agrees that it will not allow seized or detained merchandise, marked with warning labels of the fact of seizure or detention, to be placed on board a vessel, vehicle, or aircraft for exportation or to be otherwise disposed of without written permission from Customs, and that if it fails to prevent such placement or other disposition, it will redeliver the merchandise to Customs within 30 days, upon demand

made within 10 days of Customs discovery of the unlawful placement or other disposition.

(2) Principal agrees that it will act, in regard to merchandise in its possession on the date the redelivery demand is issued, in accordance with any Customs demand for redelivery made within 10 days of Customs discovery that there is reasonable cause to believe that the merchandise was exported in violation of the export control laws.

(3) Obligors agree that if the principal defaults in either of these obligations, they will pay, as liquidated damages, an amount equal to three times the value of the merchandise which was not redelivered.

William von Raab,

Commissioner of Customs.

Approved: September 17, 1987.

John P. Simpson,

Acting Assistant Secretary of the Treasury.

[FR Doc. 87-22934 Filed 10-2-87; 8:45 am]

BILLING CODE 4820-02-M

#### Bureau of Alcohol, Tobacco and Firearms

#### 27 CFR Part 9

[T.D. ATF-258; Ref. Notice No. 628]

#### Establishment of Viticultural Area; San Benito

**AGENCY:** Bureau of Alcohol, Tobacco and Firearms, Treasury.

**ACTION:** Final rule; Treasury decision.

**SUMMARY:** The Bureau of Alcohol, Tobacco and Firearms (ATF) has decided to establish a viticultural area in San Benito County, California, to be known as "San Benito." This decision is the result of a petition submitted by Almaden Vineyards, a winery and grape grower in the area. The establishment of viticultural areas and the subsequent use of viticultural area names in wine labeling and advertising enables winemakers to label wines more precisely and helps consumers to better identify the wines they purchase.

**EFFECTIVE DATE:** November 4, 1987.

**FOR FURTHER INFORMATION CONTACT:** Steve Simon, FAA, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, 1200 Pennsylvania Avenue NW., Washington, DC 20226 (202-566-7626).

#### SUPPLEMENTARY INFORMATION:

#### Background

ATF regulations in 27 CFR Part 4 provide for the establishment of definite viticultural areas. The regulations also



allow the name of an approved viticultural area to be used as an appellation of origin on wine labels and in wine advertisements.

Part 9 of 27 CFR provides for the listing of approved American viticultural areas, the names of which may be used as appellations of origin.

Section 4.25a(e)(1), Title 27 CFR, defines an American viticultural area as a delimited grape-growing region distinguishable by geographical features. Section 4.25a(e)(2) outlines the procedures for proposing an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area.

#### Petition

ATF received a petition from Almaden Vineyards, proposing that a portion of San Benito County, California, be established as a viticultural area to be known as "San Benito." The area is located along and near the San Benito River, approximately two miles south of Hollister, California.

The area contains about 45,000 acres of land, of which approximately 2,500 are planted to grapes. The petitioner stated that at least three major wineries are operating within the area, and that approximately 23 different varieties of winegrapes are grown there.

The area is located inside the approved "Central Coast" viticultural area, and contains within it the approved "Paicines," "Cienega Valley," and "Lime Kiln Valley" areas. (See the discussion of overlapping viticultural areas below, under "Boundaries of the Area.")

#### Notice of Proposed Rulemaking

In response to the petition, ATF published a notice of proposed rulemaking, Notice No. 628, in the *Federal Register* on Friday, April 10, 1987 (52 FR 11689). That notice proposed establishment of the "San Benito" viticultural area and solicited public comment concerning the proposal.

#### Public Comment

No comments were received in response to the notice of proposed rulemaking. Accordingly, this Treasury decision establishes the "San Benito" viticultural area exactly as proposed in Notice No. 628.

#### Name of the Area

The association of the name "San Benito" with the new viticultural area goes back far into history. The San Benito River flows through the area, and one of the principal streets of nearby Hollister was already called "San Benito Street" in 1874, when the surrounding

territory, including the viticultural area, was organized as "San Benito County." (See *Crimes and Career of Tiburcio Vasquez*, San Benito County Historical Society, pp. nine and seventeen.) The town of San Benito is about 15 miles southeast of the area, and San Benito Mountain is about 30 miles farther southeast, near the source of the San Benito River and the eastern boundary of San Benito County.

The history of viticulture in the area was described by John P. Ohrwall in a talk given to the San Benito County Historical Society on July 29, 1965. A copy of the talk was submitted to ATF by the petitioner. In that talk, Mr. Ohrwall related that the first vineyard in San Benito County was planted near the new viticultural area by Theophile Vache in the early 1850's. Other vineyards were planted too, and the area where vineyards were sited became known locally as the "Vineyard District." Before the end of the nineteenth century, the vineyard planted by Vache had been named "San Benito Vineyard," and, under that name, wines made in the area "were said to have won prizes at various expositions and fairs, including some held in France and Italy" (quote from Ohrwall). Gradually, additional vineyards and wineries were established. In the 1950's, Almaden Vineyards arrived and began greatly expanding the area's grape acreage. Almaden soon became the dominant grape grower in the area.

Unfortunately, the original vineyard planted by Theophile Vache is no longer in production, because the soil in that vicinity has become permeated with boron salts. (See the discussion of boron below, under "Geography of the Area.") Thus, the original "San Benito Vineyard" is excluded from the new viticultural area for a geographical reason, but the name that this vineyard gave to the area remains.

Although there are some scattered grape plantings elsewhere in San Benito County, by far the preponderance of viticulture in that county is practiced in the viticultural area established by this Treasury decision. According to the petitioner, 95 percent of the vinifera grapes from San Benito County are grown in this area. The other 5 percent are grown in other areas with different climates, according to the petitioner, who declared, "We are not aware of any other area within San Benito County that could be known as 'San Benito' or that would have comparable climatic and growing conditions." ATF agrees with these assertions, since it appears likely that much of the other 5 percent of the vinifera in San Benito County is planted in the already-established

"Pacheco Pass" viticultural area (located north of Hollister, straddling the border of San Benito and Santa Clara Counties).

Further evidence was offered by the petitioner, concerning its use of the name "San Benito" on wine labels. Since 1959, labels have appeared on wines of the petitioner, made from grapes from the viticultural area, indicating "San Benito" or "San Benito County" as the appellation of origin.

#### Geography of the Area

The petitioner presented evidence that the viticultural area is distinguished geographically from the surrounding areas, as follows:

(a) To the north, the area is distinguished from the Hollister Valley by a relative absence of fog. There are presently few or no grapes grown in the Hollister Valley, but if there were, according to the petitioner, they would be of different character from grapes grown in the "San Benito" area. According to the petitioner, "Even an extra hour of fog daily, which is the situation around Hollister, can create a different characteristic in the wine. The grapes would be slower ripening and would result in higher acid."

(b) Additionally, the viticultural area is distinguished from certain areas to its north and northeast which are burdened, to quote the petitioner, with "a high amount of boron in the water which deforms and destroys the leaves; the vines cannot grow properly and the grapes cannot ripen." This area of boron contamination includes the site of the original "San Benito Vineyard," discussed above.

Boron contamination is a natural feature of the subsoil north of the "San Benito" viticultural area. Groundwater percolating through this subsoil dissolves some of the boron salts. If such groundwater is later drawn up through wells and used for irrigation, boron contamination begins to build up in the topsoil. This apparently is what happened over a period of years in the original "San Benito Vineyard" land. Although famous for grapes for over 50 years, that land today is unsuitable for viticulture.

By contrast, vineyards located inside the new viticultural area are irrigated by water from "deep wells with an extremely low level of boron. There is no toxicity and this condition is monitored on a yearly basis," the petitioner stated.

(c) The eastern, southern, and western boundaries of the area correspond closely to a climatic change as indicated



in *Western Garden Book*, published by Sunset Books.

According to this book, the area inside the viticultural area is an "inland area with some ocean influence" which moderates the climate. By contrast, the surrounding areas to the east, south, and west are designated in the book as areas with more "sharply defined seasons," due to their higher elevations.

(d) Distinctions to the east and west, and to a lesser extent to the south as well, exist on the basis of topography. Those neighboring areas are, for the most part, too steep to be suitable for viticulture. This topographic distinction is apparent from examination of the applicable U.S.G.S. maps.

(e) Finally, the mountain areas to the east and west of the viticultural area would generally be too cold for viticulture, according to a statement made to ATF by the University of California Farm Advisor for San Benito County.

#### Boundaries of the Area

The boundaries of the new viticultural area may be found on six U.S.G.S. maps of the 7.5 minute series, titled Hollister Quadrangle, Tres Pinos Quadrangle, Quien Sabe Valley Quadrangle, Mt. Harlan Quadrangle, Paicines Quadrangle, and Cherry Peak Quadrangle. The boundaries are described in § 9.110, as added to regulations by this Treasury decision. These boundaries are slightly altered from the boundaries that were originally proposed in the petition, so that the San Benito viticultural area, as established by this document, would completely encompass the following approved viticultural areas: "Lime Kiln Valley" (§ 9.27), "Cienega Valley" (§ 9.38), and "Paicines" (§ 9.39). Further, the "San Benito" viticultural area would lie entirely within the approved "Central Coast" area (§ 9.75).

In establishing a viticultural area based on geographical features which affect viticultural features, ATF recognizes that the distinctions between a smaller area and its surroundings are more refined than the differences between a larger area and its surroundings. It is possible for a viticultural area to contain smaller approved viticultural areas, if each area fulfills the requirements for establishment of a viticultural area.

#### Miscellaneous

ATF does not want to give the impression, by approving "San Benito" as a viticultural area, that it is approving or endorsing the quality of the wine from this area. ATF is approving this area as being distinct, but not better

than other areas. By approving this area, ATF will allow wine producers to claim a distinction on labels and advertisements as to the origin of the grapes. Any commercial advantage can only come from consumer acceptance of "San Benito" wines.

#### Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a final regulatory flexibility analysis (5 U.S.C. 604) are not applicable to this final rule, because it will not have a significant economic impact on a substantial number of small entities. The final rule is not expected to have significant secondary or incidental effects on a substantial number of small entities. Further, the final rule will not impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Accordingly, it is hereby certified under the provisions of Section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this final rule will not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12291

In compliance with Executive Order 12291 of February 17, 1981, the Bureau has determined that this final rule is not a major rule, since it will not result in:

- (a) An annual effect on the economy of \$100 million or more;
- (b) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographical regions; or
- (c) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR Part 1320, do not apply to this final rule, because no requirement to collect information is imposed.

#### Drafting Information

The principal author of this document is Steve Simon, FAA, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms.

#### List of Subjects in 27 CFR Part 9

Administrative practice and procedures, Consumer protection, Viticultural areas, Wine.

#### Issuance

Accordingly, 27 CFR Part 9 is amended as follows:

#### PART 9—AMERICAN VITICULTURAL AREAS

Paragraph A. The authority citation for Part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Par. B. The table of sections in 27 CFR Part 9, Subpart C, is amended to add the title of § 9.110, to read as follows:

\* \* \* \* \*

#### Subpart C—Approved American Viticultural Areas

Sec.

\* \* \* \* \*

#### 9.110 San Benito.

\* \* \* \* \*

Par. C. Subpart C of 27 CFR Part 9 is amended by adding § 9.110, which reads as follows:

#### § 9.110 San Benito.

(a) *Name.* The name of the viticultural area described in this section is "San Benito."

(b) *Approved maps.* The appropriate maps for determining the boundaries of San Benito viticultural area are six U.S.G.S. maps. They are titled:

- (1) Hollister Quadrangle, 7.5 minute series, 1955 (photorevised 1971).
- (2) Tres Pinos Quadrangle, 7.5 minute series, 1955 (photorevised 1971).
- (3) Quien Sabe Valley Quadrangle, 7.5 minute series, 1968.
- (4) Mt. Harlan Quadrangle, 7.5 minute series, 1968.
- (5) Paicines Quadrangle, 7.5 minute series, 1968.
- (6) Cherry Peak Quadrangle, 7.5 minute series, 1968.

(c) *Boundary*—(1) *General.* The San Benito viticultural area is located in San Benito County, California. The starting point of the following boundary description is the point where the eastern border of Section 17 of Township 15 South, Range 7 East, crosses the latitude 36°37'30" (on the Cherry Peak map).

(2) *Boundary Description*—(i) From the starting point, westward along latitude 36°37'30" to the Range Line R.6E./R.7E. (on the Paicines map).

(ii) Then northward along that range line to the southern border of Section 1, Township 15 South, Range 6 East.

(iii) Then westward along that southern border to the western border of the same section.

(iv) Then northward along that western border to the 800-foot contour line.



(v) Then northwestward along that contour line to the Township Line T.14S./T.15S.

(vi) Then westward along that township line to the southern border of Section 34, Township 15 South, Range 6 East.

(vii) Then continuing westward along that southern border to the 1200-foot contour line.

(viii) Then generally northwestward along that contour line until it crosses for the second time the southern border of Section 28, Township 14 South, Range 6 East.

(ix) Then westward along that southern border to the 1400-foot contour line.

(x) Then following the 1400-foot contour line through the following sections: Sections 28, 29, and 30, Township 14 South, Range 6 East; Section 25, Township 14 South, Range 5 East; Sections 30, 19, 20, and returning to 19, Township 14 South, Range 6 East; to the point where the 1400-foot contour line intersects the section line between Sections 19 and 18, Township 14 South, Range 6 East.

(xi) From there in a straight line due northward to the 1200-foot contour line in Section 18, Township 14 South, Range 6 East.

(xii) Then following the 1200-foot contour line generally northwestward to the northern border of Section 10, Township 14 South, Range 5 East (on the Mt. Harlan map).

(xiii) Then following that northern border northwestward to the 1600-foot contour line.

(xiv) Then following the 1600-foot contour line generally northward to an unimproved road.

(xv) Then looping southward along the unimproved road and continuing eastward past the designated "Spring" and then northward parallel with Bonanza Gulch to the Vineyard School on Cienega Road (on the Hollister map).

(xvi) From there in a straight line northeastward, crossing Bird Creek and the San Benito River, to the northwestern corner of Section 19, Township 13 South, Range 6 East (on the Tres Pinos map).

(xvii) From there following the northern border of Sections 19 and 20, Township 13 South, Range 6 East, to the northeastern corner of Section 20.

(xviii) From there in a straight line due eastward to the Range line R.6E./R.7E.

(xix) Then southward along that Range line to the Township line T.13S./T.14S.

(xx) Then eastward along that Township line to the eastern border of Section 6, Township 14 South, Range 7 East (on the Quien Sabe Valley map).

(xxi) Then southward along the eastern border of Sections 6, 7, and 18, Township 14 South, Range 7 East, to the northern border of Section 20, Township 14 South, Range 7 East (on the Cherry Peak map).

(xxii) Then eastward along that northern border to the eastern border of Section 20.

(xxiii) Then southward along the eastern border of Sections 20, 29, and 32, Township 14 South, Range 7 East, and continuing southward along the eastern border of Sections 5, 8, and 17, Township 15 South, Range 7 East, to the starting point.

Signed: September 8, 1987.

Stephen E. Higgins,  
Director.

Approved: September 17, 1987.

John P. Simpson,  
Deputy Assistant Secretary Regulatory,  
Trade and Tariff Enforcement.  
[FR Doc. 87-22939 Filed 10-2-87; 8:45 am]  
BILLING CODE 4810-31-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 795 and 799

[OPTS-42043C; FRL-3273-3]

### Testing Requirement; Final Test Standards and Reporting Requirements; 1,2-Dichloropropane

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is issuing a final rule under section 4(a) of the Toxic Substances Control Act (TSCA) that requires manufacturers and processors of 1,2-dichloropropane (DCP; CAS Number 78-87-5) to: (1) Conduct pharmacokinetic (absorption, distribution, metabolism, and excretion) testing with this chemical substance, (2) utilize certain TSCA test guidelines as the test standards for previously and currently required studies for DCP, and (3) submit test data within specified timeframes.

**DATES:** In accordance with 40 CFR 23.5, this rule shall be promulgated for purposes of judicial review at 1 p.m. eastern ["daylight" or "standard" as appropriate] time on October 19, 1987.

This rule shall become effective on November 18, 1987.

**FOR FURTHER INFORMATION CONTACT:** Edward A. Klein, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Room E-543, 401 M Street SW., Washington, DC 20460, (202-554-1404).

**SUPPLEMENTARY INFORMATION:** This document promulgates a final single-phase test requirement for pharmacokinetic testing of DCP, and a final Phase II rule specifying the test standards and reporting requirements for the testing required in the September 9, 1986 (51 FR 32079) final Phase I test rule.

### I. Background

On September 9, 1986 (51 FR 32079), EPA issued a final Phase I rule under TSCA section 4 that established testing requirements for manufacturers and processors of DCP. This Phase I rule specified the following testing requirements for DCP: (1) Neurotoxicity, (2) mutagenicity (chromosomal aberrations), (3) reproductive effects, (4) developmental toxicity, (5) acute toxicity to marine and freshwater algal and mysid shrimp, and (6) chronic toxicity to mysid shrimp and *Daphnia magna*.

Also on September 9, 1986 (51 FR 32107), EPA proposed applicable TSCA guidelines as test standards. Since TSCA test guidelines were available for all the testing requirements included in the final Phase I rule, they were proposed as the test standards. A 45-day comment period was provided to allow the public, including the manufacturers and processors subject to the Phase I rule, to comment on the use of the TSCA guidelines.

As discussed in the September 9, 1986 proposal, under the two-phase process, persons subject to a final Phase I rule are normally required to submit proposed study plans after the effective date of the Phase I rule. However, because EPA proposed applicable TSCA test guidelines as the test standards for the studies required by the final DCP Phase I rule, persons subject to the rule, i.e., manufacturers and processors of DCP, were exempted from this requirement. Persons subject to the rule, however, were still required to submit notices of intent to test or exemption applications in accordance with 40 CFR 790.45. For the DCP Phase I rule, Dow Chemical Company notified EPA of its intent to sponsor all the required testing (Ref. 6). The responsibilities of manufacturers and processors of DCP for testing or requesting exemption from testing responsibilities were discussed in the DCP Phase I final rule (51 FR 32079).

After review of the public comments, EPA is now promulgating a final Phase II rule requiring the manufacturers and processors of DCP to conduct the health and environmental effects studies contained in the final Phase I test rule in



accordance with the test standards for DCP proposed in 51 FR 32107. Persons who notified EPA of their intent to test must now submit study plans (which adhere to the promulgated test standards) no later than 45 days before the initiation of each required test.

Also proposed in 51 FR 32107 was a single-phase test rule for pharmacokinetic (absorption, distribution, metabolism, and excretion) testing with DCP, including test standards and reporting requirements. After review of public comments, EPA is now promulgating a final single-phase rule requiring the manufacturers and processors of DCP to conduct the pharmacokinetic testing. As stated in Unit IV.D. of this preamble, manufacturers and processors of DCP are now required to submit notices of intent to conduct pharmacokinetic testing or exemption applications in accordance with 40 CFR 790.45.

## II. Proposed Rule

### A. Proposed Pharmacokinetic Testing

In the September 9, 1986 proposed rule, EPA proposed oral-inhalation comparative pharmacokinetic testing for DCP based on the authority of section 4(a)(1)(B) of TSCA. EPA found that DCP is produced and released to the environment in substantial quantities, and that its manufacture, processing, and use may result in substantial human exposure to this substance. The detailed basis for this finding is found in Unit IV.A. of the final Phase I test rule for DCP (51 FR 32079).

EPA also found that there are insufficient data to reasonably predict and compare the distribution and metabolism of DCP in the body as a result of oral or inhalation exposure due to DCP's manufacture, processing, and use, and that an oral-inhalation comparative pharmacokinetic study of DCP is necessary to develop such data.

### B. Proposed Test Standards

In the final Phase I test rule for DCP, the required testing included neurotoxicity, mutagenic effects (chromosomal aberrations), developmental effects, reproductive effects, mysid shrimp acute toxicity, algal acute toxicity, and daphnid and mysid chronic toxicity.

In the September 9, 1986 proposed rule, EPA proposed that: (1) The tests for neurotoxicity, i.e., neuropathology, motor activity, and functional observational battery, be conducted according to 40 CFR 798.6400, 798.6200, and 798.6050, respectively; (2) the dominant lethal assay be conducted according to 40 CFR 798.5450; (3) the

developmental toxicity study be conducted according to 40 CFR 798.4900; (4) the reproductive effects test be conducted according to 40 CFR 798.4700; and (5) the oral-inhalation comparative pharmacokinetic test (absorption, distribution, metabolism, and excretion) be conducted according to the guideline proposed in the *Federal Register* of November 6, 1985 (50 FR 46104) as § 798.7475 (codified as § 795.230 in this final rule).

With regard to environmental effects testing, EPA proposed that: (1) The algal acute tests with marine and freshwater algae be conducted according to 40 CFR 797.1050 using systems that control for DCP evaporation; (2) the acute toxicity test with mysid shrimp be conducted according to 40 CFR 797.1930 using flow-through systems and measured concentrations; and (3) the chronic toxicity tests with *Daphnia magna* and mysid shrimp be conducted according to 40 CFR 797.1330 and 797.1950, respectively, using flow-through systems and measured concentrations.

### C. Proposed Reporting Requirements

The Agency proposed the following specific reporting requirements:

1. The pharmacokinetic, neurotoxicity, dominant lethal assay, and all environmental effects tests would be completed and the final reports submitted to the Agency within 1 year of the effective date of the final Phase II test rule. A progress report on each study would be provided 6 months after the effective date of the final single-phase test rule or final Phase II test rule, whichever is applicable.

2. The developmental toxicity test would be completed and the final report submitted to the Agency within 18 months of the effective date of the final Phase II test rule. Interim progress reports would be provided every 6 months.

3. The two-generation reproductive effects test would be completed and the final report submitted to the Agency within 29 months of the effective date of the final Phase II test rule. Interim progress reports would be provided every 6 months.

## III. Response to Public Comments

In the September 9, 1986 proposed rule, EPA invited comments on the following topics:

1. The proposed testing requirement for an oral-inhalation comparative pharmacokinetic study with DCP.

2. Requiring the oral, rather than inhalation, route of administration in conducting health effects tests with DCP.

3. The proposed use of the TSCA test guidelines as the test standards for the required testing of DCP.

4. The proposed schedule for the required testing.

The Agency received written comments (Ref. 1) from Dow Chemical Company (also referred to in this document as "Dow"). A public meeting was not requested. Dow Incorporated by appendix their previous comments on all of the guidelines proposed as standards for the DCP required testing: (1) Comments submitted on October 12, 1979, and March 11, 1981, when the guidelines were first proposed, and (2) comments submitted on March 20, 1986, in response to revisions of some of the guidelines proposed in the *Federal Register* of January 14, 1986 (51 FR 1522). The revisions have been modified and finalized (52 FR 19056; May 20, 1987) after careful consideration of all industry comments, including those of Dow. The Agency believes that all of the revisions to the test standards required in this document are appropriate as test standards for DCP. The remainder of Dow's comments are discussed below.

### A. Pharmacokinetic Testing

1. *General comments.* Dow agrees that pharmacokinetic studies can be useful in hazard evaluation, but only when these studies are designed to answer specific questions posed by data generated from toxicity tests. Dow maintains that pharmacokinetic data that cannot be related to specific aspects of toxicity are difficult to interpret and have little value. Since pharmacokinetic data should answer specific questions related to toxicity, Dow believes that these studies are not suited for standard protocols and should be custom-designed for each chemical substance. Dow further commented that if the Agency mandates the use of standard protocols, these protocols should be highly flexible. This flexibility is needed to allow the use of new approaches and to make appropriate chemical-specific adaptations where necessary.

EPA does not agree with Dow that pharmacokinetic data have little value unless they are related to a specific toxicity question. Some aspects of the pharmacokinetic test, such as absorption kinetics, produce data that will help the regulatory toxicologist perform route-to-route extrapolations. Other aspects, such as tissue distribution, may indicate the need for further toxicity testing as a result of the sequestering of the chemical substance or the detection of high levels in non-target tissues. The Agency agrees with Dow that, at times, these data will be



difficult to interpret, as in the hypothetical case proposed by Dow in which sex-related differences in metabolism are observed but no sex-related differences in toxicity are detected. The Agency does not believe that the potential for generating data that is difficult to interpret is a sound rationale for determining that a given test should not be conducted. In the above example, the results of the pharmacokinetic study would have raised concern about the adequacy of the available data to support an evaluation of potential human risk from exposure.

EPA also believes that standard protocols are advantageous from a regulatory standpoint. The use of standard protocols provides a consistent body of data from which regulatory decisions can be made. Because this data set is consistent, comparisons between chemical substances can be made more easily and the historical results of regulatory decisions on substances that have been determined to be similar can be used to provide confidence in present and future decisionmaking processes.

Moreover, the Agency considers the standard protocols as used by the Agency to be highly flexible. As has occurred with many test rules, the standard protocol may be modified as a result of the chemical-specific needs of testing. This ability to modify a standard protocol provides the flexibility needed to address the special characteristics of a substance, or in the absence of such characteristics, allows the Agency to invoke the standard protocol.

2. *Specific comments.* Dow submitted specific written comments on several aspects of the proposed pharmacokinetic test procedure: Animal selection (required species, weight ranges, animal care, and testing of both sexes); administration of test substance (determinations of high dosage and manner of dosing); determination of bioavailability (time intervals for collection of excreta, measuring the concentration of test substance in expired air, and meaning of the term "saturability"); and observation of animals (time intervals for collection of blood). Comments were also submitted on proposed data analysis and reporting requirements, evaluation of results (use of statistics vs. a kinetic model), and the test report (tissue distribution and biotransformation pathways).

The Agency disagrees with some of the points raised by Dow, and a detailed explanation of the Agency's position may be found in the support document (Ref. 2) prepared for EPA by Syracuse Research Corporation (SRC) and a

memorandum written by EPA's Health and Environmental Review Division of the Office of Toxic Substances (Ref. 3). Other Dow comments have resulted in guideline modifications and are described below.

a. Dow objected to the designation of specific weight ranges for the Fischer 344 rats to be used in the proposed pharmacokinetic test. In the proposed test guideline, a range of 125 to 175 grams was specified for males while a range of 110 to 150 grams was specified for females. Dow contends that these ranges are needlessly restrictive and will result in the pointless sacrifice of otherwise useful animals. Dow further maintains that the weight ranges are too low, and that the use of such small animals will hinder blood collection from both a technical consideration in obtaining samples and as a result of the relatively small blood volume. Dow recommends that the reference to specific animal weights either be eliminated from the proposed rule or the acceptable weight ranges be increased to 180 to 250 grams for males and 130 to 160 grams for females.

The Agency objective in specifying animal weights was to obtain data on young adult male and female animals. The ages of animals in each group should be close and the range should be comparable from group to group, even when sex differs. Otherwise, age differences may complicate the interpretation of experimental data (Refs. 4 and 5). Consequently, the specified weight ranges have been deleted from 40 CFR 795.230(c)(1)(ii), and instead it is specified that all animals used in the test must be 7 to 9 weeks old. This requirement will ensure that age differences do not affect test results.

b. Dow contended that the specific environmental conditions proposed for animal maintenance are too restrictive and are not consistent with the guidelines in the *Guide for the Care and Use of Laboratory Animals* (Publication No. (NIH)-7-23, 1978). The guide recommends the use of room temperatures between 18 and 26° C and humidity of 40 to 70 percent. In the proposed test guideline, the temperature and humidity are specified as  $25 \pm 2^\circ \text{C}$  and  $50 \pm 10$  percent, respectively.

EPA believes the range of temperatures and humidity suggested by Dow for animal care is too great because broader ranges of temperature and humidity create more variables in the study and the greater ranges could stress the animals. The NIH guide is a general guide for care of laboratory animals, and not necessarily a standard for changing the temperature

requirement of  $25 \pm 2^\circ \text{C}$  as proposed in § 795.230(c)(1)(iii) (November 6, 1985; 50 FR 46104) to  $24 \pm 2^\circ \text{C}$  in § 795.230(c)(1)(iii) of this final rule to avoid the use of  $27^\circ \text{C}$  a temperature above the range recommended in the guide. The Agency believes that a humidity requirement of  $50 \pm 10$  percent is not unduly restrictive and is unchanged in the final test guideline.

c. Dow maintained that methods are not available to distinguish between concentrations of test substance in the inspired and expired air, and stated that the term "saturability" as used in the proposed test guideline is unclear.

The Agency agrees with this comment and has modified § 795.230(c)(2)(iii)(D) to eliminate the measurement of the concentration of test substance in expired air. The concentration of test substance in inspired air does not need to be "measured," since it is equal to the administered dose level (concentration in the test chamber). The calculation of percentage test substance retention, body burden, and "saturability" has also been deleted, along with the test report requirement for these values.

d. Dow objected to the proposed requirement that all results be subjected to statistical analysis. Dow maintains that statistical analysis requires the generation of hypotheses and that the proposed test rule does not provide guidance as to what hypotheses should be tested. Dow contends that there is little value in identifying statistically significant differences, since these differences are usually meaningless for pharmacokinetic studies. Dow recommends that instead of statistical analysis, the data be described using appropriate kinetic models. In addition, the proposed test guideline requires that all results, both quantitative and incidental, shall be analyzed, and Dow is unclear as to what is meant by "incidental results."

The Agency does not agree that statistical analysis is not useful for pharmacokinetic data. Data are statistically analyzed not only to test hypotheses, but also to provide a measure of the amount of variability associated with reported pharmacokinetic parameters. These parameters, such as  $K_m$  or  $V_{max}$ , are usually reported along with a standard error or standard deviation that is calculated using the results from a number of experimental determinations. This statistical analysis is needed to ensure that the study has been conducted in a competent manner and that results presented are not meaningless random values. For this reason, the Agency believes that



statistical analysis of pharmacokinetic data does provide useful and necessary information.

The Agency does agree, however, with Dow that pharmacokinetic and metabolism data should be described by an appropriate kinetic model. These models provide descriptions of pharmacokinetic processes and assist in the prediction of such values as body burden and elimination half-life, which are useful in assessing the hazard associated with exposure to a chemical substance. Pharmacokinetic models, however, should be employed in addition to, and not in place of, the statistical analyses of the data. Therefore, the test report section of the pharmacokinetic guideline in § 795.230(d)(3) is modified to ask for any pharmacokinetic model(s) developed from the experimental data.

With regard to Dow's comment on the meaning of the term "incidental" in § 795.230(d)(2), the phrase "quantitative or incidental" has been deleted to reduce any possible confusion. The section now reads, "All observed results shall be evaluated by an appropriate statistical method."

e. The language of proposed § 795.230(c)(2)(iii)(C), (3)(i)(B), (ii), and (iii) have been modified slightly in this final rule for the purpose of clarification. Collection of excreta from 0 to 24 hours and then from 24 to 48 hours is more accurate than "at 24 and 48 hours." EPA believes that terminating collection when 90 percent of the dose has been excreted will yield adequate information, and eliminate the possible situation of collecting for additional days only to account for 1 to 2 percent more of the administered dose.

#### B. Environmental Effects Testing

Dow raised issues concerning the availability of facilities to perform the proposed testing of DCP with mysid shrimp and algae during the proposed time frames.

With regard to algal toxicity testing, Dow believes that stoppering the test vessel, as recommended when testing volatile chemical substances such as DCP, will result in invalid results because decreased CO<sub>2</sub> levels will limit algal growth. Dow recommends that EPA withdraw the proposed test requirement until suitable methodology is developed. The Agency agrees that algal growth will be limited by the decreased CO<sub>2</sub> level in the test vessel; however, the growth will be limited in both control and treatment test vessels, allowing a comparison to be made. Due to this limitation effect, EPA is withdrawing the proposed requirement of § 797.1050(c)(4)(iv) that algal growth

in controls reach the logarithmic growth phase by 96 hours.

Dow also raised concern about the availability of suitable cultures to use in conducting the proposed acute and chronic mysid shrimp toxicity tests. Laboratories that have been conducting mysid testing have experienced upsets in the rearing of mysids or have had difficulty in obtaining suitable cultures for testing, e.g., cultures may suffer excessive (greater than 10 percent) mortality. The upsets may be due to poor viability of the young organisms and may be related to nutrient balance.

While EPA acknowledges that some laboratories have had this problem, the Agency believes that it is not insurmountable with regard to the mysid shrimp testing requirements for DCP. The Agency believes that adequate mysid cultures will be available to conduct the acute and chronic toxicity testing within the time allotted by this test rule (1 year).

#### IV. Final Test Rule

##### A. Pharmacokinetics

###### 1. Findings

EPA is basing its oral-inhalation comparative pharmacokinetic testing requirement on the authority of section 4(a)(1)(B) of TSCA. EPA finds that DCP is produced and released to the environment in substantial quantities, and that its manufacture, processing, and use may result in substantial human exposure to this chemical substance. The detailed basis for this finding is found in Unit IV.A. of the final Phase I test rule for DCP (51 FR 32079; September 9, 1986).

EPA also finds that there are insufficient data to reasonably predict and compare the absorption, distribution, metabolism, and excretion of DCP in the body as a result of oral or inhalation exposure due to DCP's manufacture, processing, and use, and that an oral-inhalation comparative pharmacokinetic study of DCP is necessary to develop such data. EPA believes that the data resulting from this testing will be relevant to a determination as to whether the manufacture, processing, and use of DCP does or does not present an unreasonable risk of injury to health.

###### 2. Required Testing

EPA is requiring that an oral-inhalation pharmacokinetic study be conducted with DCP.

###### 3. Other Provisions

Test substance specification, persons required to test (as amended in Unit IV.D. of this document), and

enforcement provisions presented in the final Phase I rule for DCP (51 FR 32079) are applicable to the pharmacokinetic testing of DCP.

##### B. Final Test Standards

The TSCA test guidelines (40 CFR Parts 797 and 798) specified in Unit II.B. for neurotoxicity, mutagenicity (chromosomal aberrations), reproductive effects, developmental toxicity, acute toxicity to marine and freshwater algae and mysid shrimp, chronic toxicity to mysid shrimp and *Daphnia magna*, and oral and inhalation pharmacokinetics, as modified in this rule, shall be the test standards for the testing of DCP required under 40 CFR 799.1550. The Agency believes that the conduct of the required studies in accordance with these test standards is necessary to ensure that the results are reliable and adequate.

##### C. Final Reporting Requirements

EPA requires that all data developed under this rule be reported in accordance with the TSCA Good Laboratory Practice (GLP) Standards, which appear in 40 CFR Part 792.

Test sponsors are required to submit individual study plans at least 45 days prior to the initiation of each study in accordance with 40 CFR 790.50.

The Agency is required by TSCA section 4(b)(1)(C) to specify the time period during which persons subject to a test rule must submit test data. On the basis of its experience with health and environmental effects testing, EPA is adopting the proposed schedule for the submission of final test results as the final schedule (see Unit II.C.).

TSCA section 14(b) governs Agency disclosure of all test data submitted pursuant to section 4 of TSCA. Upon receipt of data required by this rule, the Agency will publish a notice of receipt in the *Federal Register* as required by section 4(d).

##### D. Persons Required To Test

EPA does not intend for any persons who manufacture or process DCP solely as an impurity to be subject to the DCP Phase I test rule or this rule for pharmacokinetic testing of DCP. The phrase "other than as an impurity" was inadvertently omitted from § 799.1550(b)(1) in the final Phase I rule (51 FR 32079) and from § 799.1550(b)(5) in the proposed rule for pharmacokinetic testing (51 FR 32107). Therefore, those paragraphs are revised in this final rule to reflect the Agency's intention.



### E. Conditional Exemptions Granted

The test rule development and exemption procedures (40 CFR 790.87) indicate that, when certain conditions are met, exemption applicants will be notified by certified mail or in the final Phase II test rule for a given substance that they have received conditional exemptions from test rule requirements. The exemptions granted are conditional because they will be given based on the assumption that the test sponsors will complete the required testing according to the test standards and reporting requirements established in the final Phase II test rule for the given substance. TSCA section 4(c)(4)(B) provides that if an exemption is granted prospectively (that is, on the basis that one or more persons are developing test data, rather than on the basis of prior test data submissions), the Agency must terminate the exemption if the testing has not been conducted in accordance with the test rule.

Since a sponsor has indicated to EPA by letter of intent (Ref. 6) its agreement to sponsor all of the tests required for DCP in the final Phase I test rule for this substance (51 FR 32079; September 9, 1986) and EPA has adopted test standards and reporting requirements in this final Phase II test rule for DCP, the Agency is hereby granting conditional exemptions to all exemption applicants for all of the testing required for DCP in 40 CFR 799.1550 by the final Phase I test rule. However, manufacturers and processors who are subject to the testing requirements of this rule must comply with the test rule and exemption procedures in 40 CFR Part 790 with regard to pharmacokinetic testing. Manufacturers (including importers) subject to this rule are required to submit either a letter of intent to perform the pharmacokinetic testing or an exemption application on or before 30 days after the effective date of this final test rule. The required procedures for submitting such letters and applications are described in 40 CFR Part 790. A detailed discussion of persons required to test and procedures to be followed are presented in Unit IV.D. of the final Phase I rule for DCP (51 FR 32079).

### F. Judicial Review

The promulgation date for the DCP final Phase I rule was established as 1 p.m. eastern standard time on September 23, 1986. To EPA's knowledge, no petitions for judicial review of that final Phase I rule were filed. Any petition for judicial review of this final rule will be limited to a review of the test standards and reporting

requirements for the Phase II rule and to the pharmacokinetic test requirement, standards, and reporting requirements established in this rule.

### V. Economic Analysis of Final Rule

To assess the economic impact of this final rule, EPA has prepared an economic evaluation (Ref. 7) that examines the cost of the required testing, both for pharmacokinetic testing alone and in conjunction with testing required in the DCP final rule, and analyzes four market characteristics of DCP: (1) Demand sensitivity, (2) cost characteristics, (3) industry structure, and (4) market expectations. The economic evaluation for the DCP final test rule, which estimates a testing cost of \$144,610 to \$191,680 for pharmacokinetic testing, and a total testing cost of \$470,230 to \$608,350 for both the tests required in the final Phase I rule and the pharmacokinetic testing, indicates that the potential for adverse economic effects due to the estimated cost of testing is low. The annualized total test costs for DCP range from \$121,855 to \$157,648. This conclusion is based on the following observations (Ref. 7):

1. Propylene oxide (PO), the main product in DCP production, is used mainly as a captive intermediate and has a relatively inelastic demand.
2. The market expectations for PO and many of its derivatives are favorable.
3. Dow manufacturers DCP and PO at two highly integrated plants where minor cost increases can be dispersed over numerous end products.
4. The estimated total unit test costs (i.e., the test costs for DCP and PO) are negligible, or less than 0.02 cent per pound or 0.04 percent of PO price in the upper-bound case.

Refer to the economic analysis (Ref. 7) for a complete discussion of test cost estimation and the potential for economic impact resulting from these costs.

### VI. Availability of Test Facilities and Personnel

Section 4(b)(1) of TSCA requires EPA to consider "the reasonably foreseeable availability of the facilities and personnel needed to perform the testing required under the rule." Therefore, EPA conducted a study to assess the availability of test facilities and personnel to handle the additional demand for testing services created by section 4 test rules and test programs negotiated with industry in place of rulemaking. Copies of the study, "Chemical Testing Industry: Profile of Toxicological Testing," October, 1981, can be obtained through the National

Technical Information Service, 5285 Port Royal Road, Springfield, Va., 22161, under publication number PB 82-140773. On the basis of this study, the Agency believes that there will be available test facilities and personnel to perform the testing required in this final rule.

### VII. Rulemaking Record

EPA has established a record for this rulemaking, [docket number OPTS-42043C]. This record includes basic information considered by the Agency in developing this final rule, and appropriate Federal Register notices. This record includes the following information:

#### A. Supporting Documentation

The supporting documents for this rulemaking consist of the Federal Register documents containing the proposed and final Phase I and proposed Phase II and single-phase test rules on DCP.

#### B. References

- (1) Dow. The Dow Chemical Company. Comments on 1,2-dichloropropane proposed test rule and proposed test standards, 51 FR 32107. Submitted to TSCA Public Information Office (TS-793). Office of Pesticides and Toxic Substances, USEPA. Washington, DC. Document Control Number OPTS-42043. (October 24, 1986)
- (2) Syracuse Research Corporation. Response to general comments on the oral and inhalation pharmacokinetics tests. Prepared for Test Rules Development Branch, Existing Chemical Assessment Division, Office of Toxic Substances, USEPA. (January 22, 1987)
- (3) USEPA. U.S. Environmental Protection Agency. Response to TRDB request on review of SRC response to comments on pharmacokinetic guidelines. Intraagency memorandum to Gary E. Timm, Existing Chemical Assessment Division, from the Health and Environmental Review Division. (April 10, 1987)
- (4) Calabrese, E.J. "Toxic Susceptibility: Male/Female Differences." New York: John Wiley & Sons. (1985)
- (5) Calabrese, E.J. "Age and Susceptibility to Toxic Substances." New York: John Wiley & Sons. (1986)
- (6) Dow. The Dow Chemical Company. Letter of intent to conduct testing with 1,2-dichloropropane. Submitted to TSCA Public Information Office (TS-793). Office of Pesticides and Toxic Substances, USEPA. Washington, DC. Control Number OPTS 42043. (November 14, 1986)
- (7) EPA. Economic Impact Analysis of Final Test Rule for 1,2-Dichloropropane. U.S. Environmental Protection Agency, Washington, DC. (1986)

Confidential Business Information (CBI), while part of the record, is not available for public review. A public version of the record, from which CBI has been deleted, is available for



inspection from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays, in Room NE-G004, 401 M Street SW., Washington, DC.

#### VIII. Other Regulatory Requirements

##### A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a rule is "major" and therefore subject to the requirements of a Regulatory Impact Analysis. This test rule is not major because it does not meet any of the criteria set forth in section 1(b) of the Order. The economic analysis of the testing of DCP is discussed in Unit V of this notice.

This rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments from OMB to EPA, and any EPA response to those comments, are included in the rulemaking record.

##### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, (5 U.S.C. 601 *et seq.*, Pub. L. 96-354, September 19, 1980), EPA is certifying that this rule will not have a significant impact on a substantial number of small businesses for the following reasons:

- (1) There are no small manufacturers of 1,2-dichloropropane.
- (2) Small processors are not expected to perform testing themselves, or to participate in the organization of the testing efforts.
- (3) Small processors will experience only very minor costs, if any, in securing exemption from testing requirements.
- (4) Small processors are unlikely to be affected by reimbursement requirements, and any testing costs passed on to small processors through price increases will be small.

##### C. Paperwork Reduction Act

OMB has approved the information collection requirements contained in this final rule under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*, Pub. L. 96-511, December 11, 1980), and has assigned OMB control number 2070-0033.

##### List of Subjects in 40 CFR Parts 795 and 799

Chemicals, Environmental protection, Hazardous substances, Testing, Laboratories, Recordkeeping and reporting requirements.

Dated: September 25, 1987.

J.A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

Therefore, 40 CFR Chapter I, is amended as follows:

#### PART 795—[AMENDED]

##### 1. In Part 795:

a. The authority citation for Part 795 is revised to read as follows:

Authority: 15 U.S.C. 2603.

b. Section 795.230 is added, to read as follows:

##### § 795.230 Oral and inhalation pharmacokinetic test.

(a) *Purpose.* The purpose of these studies is to determine:

- (1) Bioavailability of test substance after oral and inhalation exposure.
- (2) Whether or not the biotransformation of the test substance is qualitatively and quantitatively the same after oral and inhalation exposure.
- (3) Whether or not the biotransformation of the test substance is changed qualitatively or quantitatively by repeated dosing.

(b) *Definitions.* Bioavailability refers to the rate and extent to which an administered chemical substance compound is absorbed, i.e., reaches the systemic circulation.

(c) *Test procedures.*—(1) *Animal selection.*—(i) *Species.* The preferred species is the rat for which extensive data on the toxicity and carcinogenicity of numerous chemical substances are available.

(ii) *Animals.* Adult male and female Fischer 344 rats shall be used. The rats shall be 7 to 9 weeks old. Prior to testing, the animals are selected at random for each group. Animals showing signs of ill health shall not be used.

(iii) *Animal care.* Animals shall be housed in environmentally controlled rooms with 10 to 15 air changes per hour. The rooms shall be maintained at a temperature of  $24 \pm 2^\circ\text{C}$  and humidity  $50 \pm 10$  percent with a 12-hour light/dark cycle per day. The rats shall be isolated for at least 7 days prior to use, and their health status shall then be evaluated. The animals shall be acclimated to the experimental environment for a minimum of 48 hours prior to treatment. Certified feed and water shall be provided *ad libitum*.

(iv) *Numbers.*—(A) At least 8 animals (4 males and 4 females) shall be used at each dose level.

(B) Females shall be nulliparous and nonpregnant.

(2) *Administration of the test substance.*—(i) *Test substance.* The test substance shall be at least 99 percent pure. The studies require the use of both nonradioactive and  $^{14}\text{C}$ -labeled test substance. Both preparations are needed to investigate the provisions of paragraph (a)(2) of this section. The use of  $^{14}\text{C}$ -test substance is recommended

for the provisions in paragraphs (a)(1), (a)(2), and (a)(3) of this section in order to facilitate the work, improve the reliability of quantitative determinations, and increase the probability of observing previously unidentified metabolites.

(ii) *Dosage and treatment.*—(A) *Oral study.* At least two doses shall be used in the study, a "low" and "high" dose. When administered orally, the "high" dose should induce some overt toxicity such as weight loss. The "low" dose shall not induce observable effects attributable to the test substance. Oral dosing shall be performed by gavage using an appropriate vehicle.

(B) *Inhalation study.* Three concentrations shall be used in the study. Upon exposure, the two higher concentrations should ideally induce some overt symptoms of toxicity, although the intermediate concentration may be excluded from this condition. The lowest concentration shall not induce observable effects attributable to the test substance.

(iii) *Determination of bioavailability.*—(A) *Oral studies.* (1) Group A (a minimum of 8 animals, 4 males and 4 females) shall be dosed once *per os* with the low dose of  $^{14}\text{C}$ -labeled test substance.

(2) Group B (a minimum of 8 animals, 4 males and 4 females) shall be dosed once *per os* with the high dose of  $^{14}\text{C}$ -labeled test substance.

(B) *Inhalation studies.* (1) Group C (a minimum of 8 animals, 4 males and 4 females) shall be exposed (6 hours) to a mixture of non-radioactive test substance in air at the prescribed low test substance concentration.

(2) Group D (a minimum of 8 animals, 4 males and 4 females) shall be exposed (6 hours) to a mixture of non-radioactive test substance in air at the prescribed intermediate test substance concentration.

(3) Group E (a minimum of 8 animals, 4 males and 4 females) shall be exposed (6 hours) to a mixture of non-radioactive test substance in air at the prescribed high concentration.

(4) Group F (a minimum of 8 animals, 4 males and 4 females) shall be exposed (6 hours) to a mixture of  $^{14}\text{C}$ -labeled test substance in air at the prescribed low test substance concentration.

(5) Group G (a minimum of 8 animals, 4 males and 4 females) shall be exposed (6 hours) to a mixture of  $^{14}\text{C}$ -labeled test substance in air at the prescribed intermediate test substance concentration.

(6) Group H (a minimum of 8 animals, 4 males and 4 females) shall be exposed (6 hours) to a mixture of  $^{14}\text{C}$ -labeled test



substance in air at the prescribed high test substance concentration.

(C) *Collection of excreta.* After oral administration (Groups A and B) and inhalation exposure (Groups F through H) the rats shall be placed in individual metabolic cages and excreta (urine, feces and expired air) shall be collected from 0 to 24 hours and then from 24 to 48 hours post-treatment, or until 90 percent of the dose has been excreted, whichever occurs first.

(D) *Kinetic studies.* Groups C through E shall be used to determine the concentration of the test substance in blood at 0, 5, 10, 15, and 30 minutes, and at 1, 2, 4, 8, 16, 24, and 48 hours after initiation of inhalation exposure.

(E) *Repeated dosing study.* (a) minimum of 8 animals, 4 males and 4 females) shall receive a series of single daily oral doses of non-radioactive test substance over a period of at least 7 days, followed at 24 hours after the last dose by a single oral dose of  $^{14}\text{C}$ -labeled test substance. Each dose shall be at the low-dose level. Urine shall be collected from 0 to 24 hours and then 24 to 48 hours after administering the  $^{14}\text{C}$ -labeled test substance.

(3) *Observation of animals—(i) Bioavailability—(A) Blood levels.* The levels of total  $^{14}\text{C}$ -label shall be determined in whole blood, blood plasma, or blood serum of each rat at 0, 4, 8, 16, 24, and 48 hours after dosing rats in Groups A–B and F–H.

(B) *Expired air, urinary and fecal excretion.* The quantities of total  $^{14}\text{C}$ -label eliminated in expired air, urine, and feces by each rat in Groups A and B and F through H shall be determined in collections made from 0 to 24 hours and then 24 to 48 hours after dosing and, if necessary, daily thereafter until at least 90 percent of the dose has been excreted or until 7 days after dosing, whichever occurs first.

(C) *Tissue distribution.* The concentration and quantity of  $^{14}\text{C}$ -label in tissue and organs shall be determined at the time of sacrifice for each rat in Groups A and B, F through H, and the repeated-dosing group.

(ii) *Biotransformation after oral and inhalation exposure.* Appropriate qualitative and quantitative methods shall be used to assay urine specimens collected from each rat in groups A and B and F through H. Suitable enzymatic steps should be used to distinguish, characterize, and quantify conjugated and unconjugated metabolites of the test substance.

(iii) *Change(s) in biotransformation.* Appropriate qualitative and quantitative assay methodologies shall be used to compare the composition of  $^{14}\text{C}$ -labeled components of urine collected from 0 to

24 and then from 24 to 48 hours after dosing rat Group A with those components in the urine collected over the same intervals after administering the radioactive dose in the repeated dosing study.

(d) *Data and reporting—(1) Treatment of results.* Data should be summarized in tabular form.

(2) *Evaluation of results.* All observed results shall be evaluated by an appropriate statistical method.

(3) *Test report.* In addition to the reporting requirements as specified in the EPA Good Laboratory Practice Standards (Subpart J, Part 792 of this chapter) the following specific information should be reported:

(i) Labeling site of the test substance.  
(ii) A full description of the sensitivity and precision of all procedures used to produce the data.

(iii) Quantity of isotope, together with percent recovery of the administered dose in feces, urine, expired air, and blood for both routes of administration.

(iv) Quantity and distribution of  $^{14}\text{C}$ -test substance in bone, brain, fat, gonads, heart, kidney, liver, lung, muscle, spleen, tissue which displayed pathology, and residual carcass.

(v) Biotransformation pathways and quantities of test substance and its metabolites in urine, feces, and expired air collected after oral administration (single low and high doses) and inhalation exposure (low, intermediate, and high concentrations).

(vi) Biotransformation pathways and quantities of the test substance and its metabolites in urine collected after repeated administration of test substance to rats.

(vii) Pharmacokinetic model(s), if any, developed from the experimental data.

(4) *Counting efficiency.* Data should be made available to the Agency upon request.

## PART 799—[AMENDED]

### 2. In Part 799:

a. The authority citation for Part 799 continues to read as follows:

Authority: 15 U.S.C. 2603, 2611, 2625.

b. Section 799.1550 is amended by revising paragraph (b)(1) and adding paragraphs (b)(5), (c)(1)(ii) and (iii), (2)(ii) and (iii), (3)(ii) and (iii), (4)(ii) and (iii) and (5), and (d)(1)(ii) and (iii), (2)(ii) and (iii), (3)(ii) and (iii), and (4)(ii) and (iii), and (e) to read as follows:

### § 799.1550 1,2-Dichloropropane.

(b) \* \* \*  
(1) All persons who manufacture or process 1,2-dichloropropane, other than as an impurity, from October 23, 1986 to

the end of the reimbursement period, shall submit letters of intent to conduct testing or exemption applications, conduct tests, and submit data as specified in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4), and (d) of this section, Subpart A of this Part, and Parts 790 and 792 of this chapter for two-phase rulemaking.

(5) All persons who manufacture or process 1,2-dichloropropane, other than as an impurity, from November 18, 1987 to the end of the reimbursement period, shall submit letters of intent to conduct testing or submit exemption applications, conduct tests, and submit data as specified in paragraph (c)(5) of this section, Subpart A of this part, and Parts 790 and 792 of this chapter for single-phase rulemaking.

(c) \* \* \*  
(1) \* \* \*

(ii) *Test standards.* The neurotoxicity testing with 1,2-dichloropropane, consisting of a neuropathology test, a motor activity test, and a functional observational battery, shall be conducted in accordance with §§ 798.6400, 798.6200, and 798.6050 of this chapter, respectively, using the oral route of exposure. The animals shall be dosed with DCP for a minimum of 5 days per week, over a period of at least 90 days.

(iii) *Reporting requirements.* (A) The neurotoxicity tests shall be completed and the final reports submitted to EPA within 1 year of the effective date of the final Phase II rule.

(B) An interim progress report shall be submitted to EPA 6 months after the effective date of the final Phase II rule.

(2) \* \* \*

(ii) *Test standards.* The dominant lethal assay with 1,2-dichloropropane shall be conducted in accordance with § 798.5450 of this chapter.

(iii) *Reporting requirements.* (A) The dominant lethal assay shall be completed and the final report submitted to EPA within 1 year of the effective date of the final Phase II rule.

(B) An interim progress report shall be submitted to EPA 6 months after the effective date of the final Phase II rule.

(3) \* \* \*

(ii) *Test standard.* The developmental toxicity test with 1,2-dichloropropane shall be conducted in accordance with § 798.4900 of this chapter, using the oral route of exposure.

(iii) *Reporting requirements.* (A) The developmental toxicity test shall be completed and the final report submitted to EPA within 18 months of the effective date of the final Phase II rule.



(B) Interim progress reports shall be submitted to EPA at 6-month intervals, beginning 6 months after the effective date of the final Phase II rule and ending with the submission of the Final Test Report.

(4) \* \* \*

(ii) *Test standard.* The two-generation reproductive effects testing with 1,2-dichloropropane shall be conducted in accordance with § 798.4700 of this chapter, using the oral route of exposure.

(iii) *Reporting requirement.* (A) The two-generation reproductive effects test shall be completed and the final report submitted to EPA within 29 months of the effective date of the final Phase II rule.

(B) Interim progress reports shall be submitted to EPA at 6-month intervals, beginning 6 months after the effective date of the final Phase II rule and ending with the submission of the Final Test Report.

(5) *Pharmacokinetic studies—(i) Required testing.* An oral and inhalation pharmacokinetic test shall be conducted with 1,2-dichloropropane.

(ii) *Test standard.* The oral and inhalation pharmacokinetic testing with 1,2-dichloropropane shall be conducted in accordance with § 795.230 of this chapter.

(iii) *Reporting requirements.* (A) The pharmacokinetic test shall be completed and the final report submitted to EPA within 1 year of the effective date of the final single-phase pharmacokinetics rule.

(B) An interim progress report shall be submitted to EPA 6 months after the effective date of the final single-phase rule.

(d) \* \* \*

(1) \* \* \*

(ii) *Test standard.* The mysid shrimp acute toxicity test with 1,2-dichloropropane shall be conducted as a flow-through test with measured concentrations using *Mysidopsis bahia* in accordance with § 797.1930 of this chapter.

(iii) *Reporting requirements.* (A) The mysid acute toxicity test shall be completed and the final report submitted to EPA within 1 year of the effective date of the final Phase II rule.

(B) An interim progress report shall be submitted to EPA 6 months after the effective date of the final Phase II rule.

(2) \* \* \*

(ii) *Test standard.* (A) The algal acute toxicity tests with 1,2-dichloropropane shall be conducted with marine and freshwater algae using systems that control for 1,2-dichloropropane evaporation in accordance with

§ 797.1050 of this chapter, except for the provisions in § 797.1050(c)(4)(iv).

(B) For the purpose of this section, the following provisions also apply to the algal acute toxicity tests:

(1) *Definitive test.* The test begins when algae from 7 to 10-day-old stock cultures are placed in the test chambers containing test solutions having the appropriate concentrations of the test substance. At the end of 96 hours the algal growth response (number or weight of algal cells/ml) in all test containers and controls should be determined by an indirect (spectrophotometry, electronic cell counters, dry weight, etc.) or a direct (actual microscopic cell count) method. Indirect methods should be calibrated by a direct microscopic count. The percentage inhibition or stimulation of growth for each concentration, EC<sub>10</sub>, EC<sub>50</sub>, EC<sub>90</sub>, and the concentration-response curves are determined from these counts.

(2) [Reserved]

(iii) *Reporting requirements.* (A) The algal acute toxicity tests shall be completed and the final report submitted to EPA within 1 year of the effective date of the final Phase II rule.

(B) An interim progress report shall be submitted to EPA 6 months after the effective date of the final Phase II rule.

(3) \* \* \*

(ii) *Test standard.* The daphnid chronic toxicity test with 1,2-dichloropropane shall be conducted as a flowthrough test using *Daphnia magna* in accordance with § 797.1330 of this chapter.

(iii) *Reporting requirements.* (A) The daphnid chronic toxicity test shall be completed and the final report submitted to EPA within 1 year of the effective date of the final Phase II rule.

(B) An interim progress report shall be submitted to EPA 6 months after the effective date of the final Phase II rule.

(4) \* \* \*

(ii) *Test standard.* The mysid shrimp chronic toxicity test with 1,2-dichloropropane shall be conducted as a flowthrough test using *Mysidopsis bahia* in accordance with § 797.1950 of this chapter.

(iii) *Reporting requirements.* (A) The mysid chronic toxicity test shall be completed and the final report submitted to EPA within 1 year of the effective date of the final Phase II rule.

(B) An interim progress report shall be submitted to EPA 6 months after the effective date of the final Phase II rule.

(e) *Effective date.* The effective date of the final Phase II rule and the final single-phase pharmacokinetics rule for

1,2-dichloropropane is November 18, 1987.

[FR Doc. 87-22914 Filed 10-2-87; 8:45 am]

BILLING CODE 6560-50-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 45 CFR Part 2

#### Testimony by Employees and the Production of Documents in Proceedings Where the United States is Not a Party

**AGENCY:** Department of Health and Human Services.

**ACTION:** Final rule.

**SUMMARY:** This rule adds a new Part 2 to Title 45 of the Code of Federal Regulations. It generally provides that Department of Health and Human Services employees may not give testimony as part of their official duties without the approval of the head of their agency in litigation where the United States or other federal agencies are not parties. The purpose of this regulation is to maintain the Department of Health and Human Services policy of strict impartiality with respect to private litigants and to minimize the disruption of official duties. This regulation is also intended to provide for the orderly and efficient processing of all written requests for documents.

**EFFECTIVE DATE:** November 4, 1987.

**FOR FURTHER INFORMATION CONTACT:** Darrel J. Grinstead, Associate General Counsel, Business and Administrative Law Division, Office of the General Counsel, Room 5362 HHS North Building, 330 Independence Avenue SW., Washington, DC 20201 (202) 475-0150.

**SUPPLEMENTARY INFORMATION:** With increasing frequency, Department of Health and Human Services employees are requested or subpoenaed to give testimony or provide documents in litigation in which the United States is not a party. This regulation is intended to address this problem by prohibiting both voluntary appearances and compliance by employees with subpoenas for testimony as part of their official duties except where the agency head determines that the appearance would promote the objectives of the Department of Health and Human Services. In addition, this housekeeping regulation provides for the orderly handling of subpoenas duces tecum by treating these as requests for documents under the Freedom of Information Act (5 U.S.C. 552).



Subpoenas to testify concerning information which employees have acquired in the course of performing their official duties, or to produce documents, are essentially legal actions against the United States as to which there has been no statutory waiver of sovereign immunity. The courts have recognized the authority of federal agencies to limit compliance with such subpoenas. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986); *Giza v. Secretary of HEW*, 626 F.2d 748 (1st Cir. 1980); *Reynolds Metals Co. v. Crowther*, 572 F. Supp. 288 (D. Mass. 1982).

Accordingly, this regulation prohibits Department of Health and Human Services employees from complying with requests or subpoenas for testimony in private litigation or other proceedings without the approval of the agency head. In addition, the regulation provides that a subpoena duces tecum directed to a Department employee will be handled as a request for documents under the Freedom of Information Act.

This regulation does not apply to situations where an employee serves as an expert witness in connection with professional and consultative services performed as non-official activities; in situations where an employee makes an appearance in a legal or administrative proceeding (such as cases arising out of traffic accidents, crimes, domestic relations, etc.) that does not relate to the Department of Health and Human Services and does not involve the employee's professional and consultative services; or to consultative services and technical assistance provided by the Department of Health and Human Services in carrying out its normal program activities. Also, this regulation is not applicable to Congressional subpoenas or requests for information. The Food and Drug Administration, a component of this Department, has promulgated its own regulations on this subject (21 CFR Part 20, Subpart A). This part does not apply to employees of that agency. This part also does not apply to the handling of subpoenas directed to the Social Security Administration which are covered under regulations found at 20 CFR Part 401.

The regulation does not specifically address situations in which Department of Health and Human Services health care personnel in the Public Health Service are asked to participate in legal proceedings in connection with the health care actually provided by them directly to individual patients as a part of their official duties. However, the

Assistant Secretary for Health intends to make appropriate delegations of authority so that, in such circumstances, lower level Public Health Service officials will be able to permit participation by these employees in appropriate cases without the Assistant Secretary's involvement.

These regulations would apply where a state or local government, but not the United States or a Federal agency, is a party in litigation.

The Freedom of Information Act requires agencies to provide nonexempt documents in response to written request, and a subpoena duces tecum amounts to a written request for documents. Accordingly, subpoenas duces tecum except as otherwise specified will be handled as Freedom of Information Act requests under Department of Health and Human Services' regulations, 45 CFR Part 5, unless the agency head or designee has granted approval to respond in strict accordance with the terms of the subpoena.

Finally, Department of Health and Human Services agencies are sometimes asked to certify the authenticity of copies of official documents. Provisions of such services is addressed in the regulations implementing the Freedom of Information Act, 45 CFR Part 5.

#### Paperwork Reduction Act

This regulation is not subject to the Paperwork Reduction Act because it deals solely with internal rules governing Department of Health and Human Services personnel.

#### Cost/Regulatory Analysis

The Secretary has determined, in accordance with Executive Order 12291, that this rule will not constitute a "major" rule and therefore is not subject to the regulatory impact and analysis requirements of the Order. Major rules are those which impose a cost on the economy of \$100 million or more a year and have certain other economic impacts.

The rule will not have a significant impact on small businesses; therefore, preparation of a regulatory flexibility analysis is not required.

#### List of Subjects in 45 CFR Part 2

Administrative practice and procedure, Freedom of Information, Government employees.

Dated: September 4, 1987.

Otis R. Bowen,  
Secretary.

For reasons stated in the preamble, Part 2 is added, as set forth below, to

Title 45 of the Code of Federal Regulations.

### PART 2—TESTIMONY BY EMPLOYEES AND PRODUCTION OF DOCUMENTS IN PROCEEDINGS WHERE THE UNITED STATES IS NOT A PARTY

Sec.

- 2.1 Scope, purpose, and applicability.
- 2.2 Definitions.
- 2.3 Policy on presentation of testimony and production of documents.
- 2.4 Procedures when voluntary testimony is requested or when an employee is subpoenaed.
- 2.5 Subpoenas duces tecum.
- 2.6 Certification and authentication of records.

Authority: 5 U.S.C. 301, 5 U.S.C. 552.

#### § 2.1 Scope, purpose, and applicability.

(a) This part sets forth rules to be followed when a Department of Health and Human Services employee, other than an employee of the Food and Drug Administration or the Social Security Administration, is requested or subpoenaed to provide testimony, in a deposition, trial, or other similar proceeding, concerning information acquired in the course of performing official duties or because of the employee's official capacity. This part also sets forth procedures for the handling of subpoenas duces tecum for any document in the possession of the Department of Health and Human Services other than the Food and Drug Administration and the Social Security Administration, and to requests for certification of copies of documents. Separate regulations, 21 CFR Part 20 and 20 CFR Part 401, govern the Food and Drug Administration and the Social Security Administration and those regulations will not be affected by this part.

(b) It is the policy of the Department of Health and Human Services to provide information, data, and records to non-federal litigants to the same extent and in the same manner that they are available to the general public. The availability of Department of Health and Human Services' employees to testify in litigation not involving Federal parties is governed by the Department of Health and Human Services' policy on maintaining strict impartiality with respect to private litigants and to minimize the disruption of official duties.

(c) This part applies to state and local court, administrative, and legislative proceedings and Federal court and administrative proceedings.

(d) These procedures do not apply to:

(1) Any civil proceedings where the United States, the Department of Health



and Human Services, and agency thereof, or any other Federal agency is a party.

(2) Congressional requests or subpoenas for testimony or documents.

(3) Consultative services and technical assistance provided by the Department of Health and Human Services, or any agency thereof, in carrying out its normal program activities.

(4) Employees serving as expert witnesses in connection with professional and consultative services as approved outside activities in accordance with 45 CFR 73.735-704 and 73.735-708. (In cases where employees are providing such outside services, they must state for the record that the testimony represents their own views and does not necessarily represent the official position of the Department of Health and Human Services.)

(5) Employees making appearances in their private capacity in legal or administrative proceedings that do not relate to the Department of Health and Human Services (such as cases arising out of traffic accidents, crimes, domestic relations, etc.) and not involving professional and consultative services.

## § 2.2 Definitions.

*Agency Head* refers to the head of the relevant operating division or other major component of the Department of Health and Human Services, or his or her delegates. For each component of the Department, the Agency Head for the purposes of this part is as follows:

(1) Office of the Secretary—Assistant Secretary for Management and Budget;

(2) Office of Human Development Services—Assistant Secretary for Human Development Services;

(3) Public Health Service—Assistant Secretary for Health;

(4) Health Care Financing Administration—Administrator;

(5) Family Support Administration—Administrator; and

(6) Social Security Administration—Commissioner.

*Employee* includes commissioned officers in the Public Health Service Commissioned Corps, as well as regular and special Department of Health and Human Services employees (except employees of the Food and Drug Administration).

*Testify and testimony* includes both in-person, oral statements before a court, legislative or administrative body and statements made pursuant to depositions, interrogatories, declarations, affidavits, or other formal participation.

## § 2.3 Policy on presentation of testimony and production of documents

(a) No Department of Health and Human Services employee may provide testimony or produce documents in any proceedings to which this part applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with the Department of Health and Human Services unless authorized by the Agency head pursuant to this part based on a determination by the Agency head, after consultation with the Office of the General Counsel, that compliance with the request would promote the objectives of the Department of Health and Human Services.

(b) The Office of the General Counsel will request the assistance of the Department of Justice where necessary to represent the interests of the Department of Health and Human Services and its employees under this part.

## § 2.4 Procedures when voluntary testimony is requested or when an employee is subpoenaed.

(a) All requests for testimony by a Department of Health and Human Services employee in his or her official capacity and not subject to the exceptions set forth in § 2.1(d), of this part, must be in writing and must state the nature of the requested testimony, why the information sought is unavailable by any other means, and the reasons why the testimony would be in the interests of the Department of Health and Human Services or the Federal Government.

(b) If the Agency head denies approval to comply with a subpoena for testimony, or if the Agency head has not acted by the return date, the employee will appear at the stated time and place, unless advised by the Office of the General Counsel that responding to the subpoena would be inappropriate (in such circumstances as, for example, an instance where the subpoena was not validly issued or served, where the subpoena has been withdrawn, or where discovery has been stayed), produce a copy of these regulations, and respectfully decline to testify or produce any documents on the basis of these regulations.

## § 2.5 Subpoenas duces tecum.

(a) Subpoenas duces tecum for records of the Department of Health and Human Services shall be deemed a request for records under the Freedom of Information Act and shall be handled pursuant to the rules governing public disclosure established in 45 CFR Part 5.

(b) Whenever a subpoena duces tecum, in appropriate form, has been lawfully served upon a Department of Health and Human Services' employee commanding the production of any record, such employee, after consultation with the Office of the General Counsel, shall appear in response thereto, respectfully decline to produce the record(s) on the ground that it is prohibited by this section, and state that the production of the record(s) involved will be handled by the procedures and disclosure rules established in 45 CFR Part 5.

## § 2.6 Certification and authentication of records.

Upon request, Department of Health and Human Services' agencies will certify the authenticity of copies of records that are to be disclosed pursuant to 45 CFR Part 5 and will authenticate copies of records previously disclosed. Fees for such certification are set forth in 45 CFR 5.43.(e)(5).

[FR Doc. 87-22741 Filed 10-2-87; 8:45 am]

BILLING CODE 4150-04-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 20

#### Migratory Bird Hunting; Final Frameworks for Late Season Migratory Bird Hunting Regulations; California

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** This rule prescribes final late-season frameworks from which California may select season dates, limits and other options for the 1987-88 migratory bird hunting seasons in those areas of the State designated for nontoxic shot use, as described in the July 21, 1987, *Federal Register* (52 FR 27368).

The U.S. Fish and Wildlife Service (hereinafter the Service) annually prescribes hunting regulations frameworks to the States to facilitate their selection of hunting seasons and to further the establishment of the late-season migratory bird hunting regulations. Final late-season frameworks for the States (including California) were published in the September 18, 1987, *Federal Register* (52 FR 35248). However, in the absence of California's approval for the



implementation and enforcement of nontoxic shot regulations in those areas described in the July 21, 1987, **Federal Register** the final frameworks specific to California did not authorize the hunting of waterfowl and coots in those nontoxic shot use areas. On September 29, 1987, California gave its approval for the implementation and enforcement of those nontoxic shot use areas.

**EFFECTIVE DATE:** This rule takes effect on October 5, 1987.

**ADDRESS:** Comments received on the proposed late-season frameworks are available for public inspection during normal business hours in Room 536, Matomic Building, 1717 H Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Rollin D. Sparrowe, Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, Matomic Building, Room 536, Washington, DC 20240. Telephone (202) 254-3207.

**SUPPLEMENTARY INFORMATION:** The Migratory Bird Treaty Act of July 3, 1918, (40 Stat. 755; 16 U.S.C. 703 *et seq.*), as amended, authorizes and directs the Secretary of the Interior, having due regard for the zone of temperature and for the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory game birds, to determine when, to what extent, and by what means such birds or any part, nest or egg thereof may be taken, hunted, captured, killed, possessed, sold, purchased, shipped, carried, exported or transported.

On January 15, 1987, and July 21, 1987, the Service published proposed and final rules, respectively, in the **Federal Register** (52 FR 1636 and 27352, respectively) describing zones in which the use of lead shot is prohibited for hunting waterfowl, coots and certain other species in the 1987-88 season. In both documents the Service gave notice that if States do not approve nontoxic shot zones when current Service guidelines and criteria indicate that such zones are necessary to protect migratory birds, the Service will not open the areas to waterfowl and coot hunting.

On September 18, 1987, the Service published final late-season frameworks from which States may select season dates, limits and other options for the 1987-88 migratory bird hunting season. However, because California had withdrawn its approval of the nontoxic shot areas, as described in the July 21, 1987, **Federal Register**, the final frameworks did not authorize the hunting of waterfowl and coots in those areas.

Subsequently, on September 29, 1987, California approved the nontoxic shot areas. Therefore, this rulemaking document establishes the final frameworks for late-season migratory bird hunting regulations for the 1987-88 season in California's nontoxic shot zones. The final frameworks for the late-season migratory bird hunting regulations for California, as published in the September 18, 1987, **Federal Register** (52 FR 35248) are applicable to California's nontoxic shot zones and are repeated in their entirety in this document.

#### NEPA Consideration

The "Final Environmental Statement for the Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FES 75-54)" was filed with the Council of Environmental Quality on June 6, 1975, and notice of availability was published in the **Federal Register** on June 13, 1975, (40 FR 25241). In addition, several environmental assessments have been prepared on specific matters which serve to supplement the material in the Final Environmental Statement. Copies of the environmental assessments are available from the Service at the address indicated under the caption **ADDRESS**. As noted in the March 13, 1987, **Federal Register** (52 FR 7905), the Service is preparing a Supplemental Environmental Impact Statement (SEIS) on the FES. A draft SEIS will be available in early October.

#### Endangered Species Act Consideration

Section 7 of the Endangered Species Act provides that, "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act" [and shall] "insure that any action authorized, funded, or carried out \* \* \* is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of [critical] habitat \* \* \*". The Service therefore initiated section 7 consultation under the Endangered Species Act for the proposed hunting season frameworks.

On June 15, 1987, the Office of Endangered Species gave a biological opinion that the proposed action was not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitats.

As in the past, hunting regulations this year are designed, among other things, to remove or alleviate chances of conflict between seasons for migratory

game birds and the protection and conservation of endangered and threatened species.

The Service's biological opinion resulting from its consultation under section 7 is considered a public document and is available for public inspection in or available from the Office of Endangered Species and the Office of Migratory Bird Management, Department of the Interior, Washington, DC.

#### Regulatory Flexibility Act, Executive Order 12291 and the Paperwork Reduction Act

In the **Federal Register** dated March 13, 1987, (52 FR 7900), the Service reported measures it had undertaken to comply with requirements of the Regulatory Flexibility Act and the Executive Order. These included preparing a Determination of Effects and an updated Final Regulatory Impact Analysis, and publication of a summary of the latter. These regulations have been determined to be major under Executive Order 12291 and they have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act. This determination is detailed in the aforementioned documents which are available upon request from the Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, Matomic Building, Room 536, Washington, DC 20240. These final regulations contain no information collections subject to Office of Management and Budget review under the Paperwork Reduction Act.

#### Memorandum of Law

The Service published its Memorandum of Law, required by section 4 of Executive Order 12291, in the **Federal Register** dated August 3, 1987 (52 FR 28717).

#### Authorship

The primary author of this final rule is Morton M. Smith, Office of Migratory Bird Management, working under the direction of Rollin D. Sparrowe, Chief.

#### Regulations Promulgation

The rulemaking process for migratory bird hunting must, by its nature, operate under severe time constraints. However, the Service is of the view that every attempt should be made to give the public the greatest possible opportunity to comment on the regulations. Thus, when the proposed late hunting season rulemakings were published on March 13, June 3, and August 14, 1987, the Service established what it believed



were the longest periods possible for public comment. In doing this, the Service recognized that at the close of each period time would be of the essence. That is, if there were a delay in the effective date of these regulations after this final rulemaking, the Service is of the opinion that the States would have insufficient time to select season dates, shooting hours and limits; to communicate those selections to the Service; and to establish and publicize the necessary regulations and procedures that implement their decisions.

Therefore, the Service under authority of the Migratory Bird Treaty Act of July 3, 1918, as amended (40 Stat. 755; 16 U.S.C. 703 *et seq.*), prescribes final frameworks setting forth the species to be hunted, the daily bag and possession limits, the shooting hours, the season lengths, the earliest opening and latest closing season dates, and hunting areas, from which State conservation agency officials may select hunting season dates and other options. Upon receipt of season and option selections from State officials, the Service will publish in the *Federal Register* a final rulemaking amending 50 CFR Part 20 (§§ 20.104 through 20.107 and 20.109) to reflect seasons, limits and shooting hours for the conterminous United States for the 1987-88 season.

The Service therefore finds that "good cause" exists, within the terms of 5 U.S.C. 553(d)(3) of the Administrative Procedure Act, and these frameworks will, therefore, take effect immediately upon publication.

#### List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Transportation, Wildlife.

The rules that eventually will be promulgated for the 1987-88 hunting season are authorized under the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755; 16 U.S.C. 701-708h); the Fish and Wildlife Improvement Act of 1978 (92 Stat. 3112; 16 U.S.C. 712); and the Alaska Game Act of 1925 (43 Stat. 739; as amended, 54 Stat. 1103-04).

#### Final Regulations Frameworks for 1987-88 Late Hunting Seasons on Certain Migratory Game Birds

Pursuant to the Migratory Bird Treaty Act, the Secretary of the Interior has approved final frameworks for season lengths, shooting hours, bag and possession limits and outside dates within which California may select seasons for hunting waterfowl and coots. Frameworks are summarized below.

#### Pacific Flyway

The Pacific Flyway includes Arizona, California, Colorado (west of the Continental Divide), Idaho, Montana (including and to the west of Hill, Chouteau, Cascade, Meagher and Park Counties), Nevada, New Mexico (the Jicarilla Apache Indian Reservation and west of the Continental Divide), Oregon, Utah, Washington and Wyoming (west of the Continental Divide including the Great Divide Basin).

#### Ducks, Coots, Common Moorhens, and Common Snipe

*Outside dates:* Between October 3, 1987, and January 10, 1988.

*Hunting seasons:* Seasons may be split into two segments. Concurrent 79-day seasons on ducks (including mergansers), coots, common moorhens (gallinules) and common snipe may be selected except as subsequently noted.

*Duck limits:* The basic daily bag limit is 5 ducks, including no more than 4 mallards but only 1 female mallard, 4 pintails but only 1 female pintail, and either 2 canvasbacks or 2 redheads or 1 of each. The possession limit is twice the daily bag limit.

*Coot and common moorhen (gallinule) limits:* The daily bag and possession limit of coots and common moorhens is 25 singly or in the aggregate.

*Common snipe limits:* The daily bag and possession limit of common snipe is 8 and 16, respectively.

*California—waterfowl zones:* Season dates for the Colorado River Zone of California must coincide with season dates selected by Arizona. Season dates for the Northeastern and Southern Zones of California may differ from those in the remainder of the State.

#### Geese (Including Brant)

*Outside dates, season lengths and limits on geese (including brant):* Seasons may be split into two segments. Between October 3, 1987, and January 17, 1988, a 93-day season on geese (except brant) may be selected, except as subsequently noted. The basic daily bag and possession limit is 6, provided that the daily bag limit includes no more than 3 white geese (snow, including blue, and Ross' geese) and 3 dark geese (all other species of geese). Between October 3, 1987, and January 10, 1988, California may select an open season for brant with daily bag and possession limits of 2 and 4 brant, respectively. The brant season may not exceed 30 consecutive days in California and must run concurrent with the duck season.

*Aleutian Canada goose closure:* There will be no open season on Aleutian Canada geese. Emergency closures may

be invoked for all Canada geese should Aleutian Canada goose distribution patterns or other circumstances justify such actions.

*California—cackling Canada goose closure:* There will be no open season on the cackling Canada geese in California.

*California—Canada goose and dark goose closures:* Three areas in California, described as follows, are restricted in the hunting of certain geese:

(1) In the counties of Del Norte and Humboldt there will be no open season for Canada geese.

(2) In the Sacramento Valley in that area bounded by a line beginning at Willows in Glenn County proceeding south on Interstate Highway 5 to the junction with Hahn Road north of Arbuckle in Colusa County; then easterly on Hahn Road and the Grimes-Arbuckle Road to Grimes on the Sacramento River; then southerly on the Sacramento River to the Tisdale Bypass; then easterly on the Tisdale Bypass to where it meets O'Banion Road; then easterly on O'Banion Road to State Highway 99; then northerly on State Highway 99 to its junction with the Gridley-Colusa Highway in Gridley in Butte County; then westerly on the Gridley-Colusa Highway to its junction with the River Road; then northerly on the River Road to the Princeton Ferry; then westerly across the Sacramento River to State Highway 45; then northerly on State Highway 45 to its junction with State Highway 162; then continuing northerly on State Highway 45-162 to Glenn; then westerly on State Highway 162 to the point of beginning in Willows, there will be no open season for Canada geese. In this area, the season on dark geese must end on or before November 30, 1987.

(3) In the San Joaquin Valley in that area bounded by a line beginning at Modesto in Stanislaus County proceeding west on State Highway 132 to the junction of Interstate Highway 5; then southerly on Interstate Highway 5 to the junction of State Highway 152 in Merced County; then easterly on State Highway 152 to the junction of State Highway 59; then northerly on State Highway 59 to the junction of State Highway 99 at Merced; then northerly and westerly on State Highway 99 to the point of beginning; the hunting season for Canada geese will close no later than November 23, 1987.

*California (Northeastern Zone)—geese:* In the Northeastern Zone of California the season may be from October 10, 1987, to January 10, 1988, except that white-fronted geese may be taken only during October 10 to



November 1, 1987. Limits will be 3 geese per day and 6 in possession, of which not more than 1 white-fronted goose or 2 Canada geese shall be in the daily limit and not more than 2 white-fronted geese and 4 Canada geese shall be in possession.

**California (balance of the state zone)—geese:** In the Balance of the State Zone the season may be from October 31, 1987, through January 17, 1988, except that white-fronted geese may be taken only during October 31, 1987, to January 3, 1988. Limits shall be 3 geese per day and in possession, of which not more than 1 may be a dark goose. The dark goose limits may be expanded to 2 provided that they are Canada geese (except Aleutian and cackling Canada geese for which the season is closed).

**California:** In California, the Colorado River Zone where the season must be the same as that selected by Arizona and the Southern Zone, the season for Canada may be no more than 86 days. The daily bag and possession limit is 2 Canada geese except in that portion of California Department of Fish and Game District 22 within the Southern Zone (i.e. Imperial Valley) where the daily bag and possession limits for Canada geese are 1 and 2, respectively.

Date: September 30, 1987.

William P. Horn.

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 87-22936 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-55-M

## 50 CFR Part 20

### Migratory Bird Hunting; Late Seasons, and Bag and Possession Limits for Certain Migratory Birds in the United States; California

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule amendment.

**SUMMARY:** This rule prescribes the late open seasons, hunting hours, hunting areas, and daily bag and possession limits for general waterfowl and coot hunting seasons in those areas of California designated for nontoxic shot use as described in the July 21, 1987, *Federal Register* (52 FR 27368).

**DATE:** Effective on October 5, 1987.

**FOR FURTHER INFORMATION CONTACT:** Rollin D. Sparrowe, Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240. Phone (202) 254-3207.

**SUPPLEMENTARY INFORMATION:** The Migratory Bird Treaty Act of July 3,

1918, (40 Stat. 755; 16 U.S.C. 703 *et seq.*), as amended, authorizes and directs the Secretary of the Interior, having due regard for the zone of temperature and for the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory game birds, to determine when, to what extent, and by what means such birds or any part, nest or egg thereof may be taken, hunted, captured, killed, possessed, sold, purchased, shipped, carried, exported or transported.

On January 15, 1987, and July 21, 1987, the U.S. Fish and Wildlife Service (hereinafter the Service) published proposed and final rules, respectively, in the *Federal Register* (52 FR 1636 and 27352, respectively) describing zones in which the use of lead shot is prohibited for hunting waterfowl, coots and certain other species in the 1987-88 season. In both documents the Service gave notice that if States do not approve nontoxic shot zones when current Service guidelines and criteria indicate that such zones are necessary to protect migratory birds, the Service will not open the areas to waterfowl and coot hunting.

On September 18, 1987, the Service published final late-season frameworks in the *Federal Register* (52 FR 35248) from which States may select season dates, limits and other options for the 1987-88 migratory bird hunting season. However, because California had withdrawn its approval of the nontoxic shot areas, as described in the July 21, 1987, *Federal Register*, the final frameworks did not authorize the hunting of waterfowl and coots in those areas.

On September 29, 1987, the Service published in the *Federal Register* (52 FR 36496) seasons, limits and shooting hours for waterfowl and certain other migratory game birds. In § 20.105 (at 52 FR 36530) the entry for seasons, limits and shooting hours for waterfowl and coots in California was accompanied by a footnote (i.e., footnote (2)) that indicated no hunting of waterfowl and coots is authorized in those areas of California designated for nontoxic shot use as described in the July 21, 1987, *Federal Register* (52 FR 27368).

On September 29, 1987, California approved the areas designated for nontoxic shot use. The Service therefore has published a final rule elsewhere in this issue of the *Federal Register* that establishes final frameworks for waterfowl and coot hunting regulations for the 1987-88 season in those areas of California.

This document serves to establish the open seasons, hunting hours, hunting areas, and daily bag and possession limits for waterfowl and coot hunting in

those areas of California designated for nontoxic shot use as described in the July 21, 1987, *Federal Register* (52 FR 27368). The entry for seasons, limits and shooting hours for waterfowl and coots in California in § 20.105 of the September 29, 1987, *Federal Register* (at 52 FR 36496) is now applicable to the areas of California designated for nontoxic shot use, and the accompanying footnote is removed.

## NEPA Consideration

The "Final Environmental Statement for the Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FES 75-54)" was filed with the Council of Environmental Quality on June 6, 1975, and notice of availability was published in the *Federal Register* on June 13, 1975, (40 FR 25241). In addition, several environmental assessments have been prepared on specific matters which serve to supplement the material in the Final Environmental Statement. Copies of the environmental assessments are available from the Service at the address indicated under the caption ADDRESS. As noted in the March 13, 1987, *Federal Register* (52 FR 7905), the Service is preparing a Supplemental Environmental Impact Statement (SEIS) on the FES. A draft SEIS will be available in early October.

## Endangered Species Act Consideration

Section 7 of the Endangered Species Act provides that, "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act" [and shall] "insure that any action authorized, funded, or carried out \* \* \* is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of [critical] habitat \* \* \*". The Service therefore initiated section 7 consultation under the Endangered Species Act for the proposed hunting season frameworks.

On June 15, 1987, the Office of Endangered Species gave a biological opinion that the proposed action was not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitats.

As in the past, hunting regulations this year are designed, among other things, to remove or alleviate chances of conflict between seasons for migratory game birds and the protection and conservation of endangered and threatened species.



The Service's biological opinion resulting from its consultation under section 7 is considered a public document and is available for public inspection in or available from the Office of Endangered Species and the Office of Migratory Bird Management, Department of the Interior, Washington, DC.

#### Regulatory Flexibility Act, Executive Order 12291 and the Paperwork Reduction Act

In the *Federal Register* dated March 13, 1987, (52 FR 7900), the Service reported measures it had undertaken to comply with requirements of the Regulatory Flexibility Act and the Executive Order. These included preparing a Determination of Effects and an updated Final Regulatory Impact Analysis, and publication of a summary of the latter. These regulations have been determined to be major under Executive Order 12291 and they have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act. This determination is detailed in the aforementioned documents which are available upon request from the Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, Matomic Building, Room 536, Washington, DC 20240. These final regulations contain no information collections subject to Office of Management and Budget review under the Paperwork Reduction Act.

#### Memorandum of Law

The Service published its Memorandum of Law, required by section 4 of Executive Order 12291, in the *Federal Register* dated August 3, 1987 (52 FR 28717).

#### Authorship

The primary author of this final rule is Morton M. Smith, Office of Migratory Bird Management, working under the direction of Rollin D. Sparrowe, Chief.

#### List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Transportation, Wildlife.

#### PART 20—[AMENDED]

For the reasons set out in the preamble, Title 50, Chapter I, Subchapter B, Part 20, Subpart K, § 20.105 is amended as follows:

1. The authority citation for Part 20 continues to read as follows:

Authority: Migratory Bird Treaty Act, sec. 3, Pub. L. 65-186, 40 Stat. 755 (16 U.S.C. 701-708h); sec. 3(h), Pub. L. 95-616, 92 Stat. 3112

(16 U.S.C. 712); Alaska Game Act of 1925, 43 Stat. 739, as amended, 54 Stat. 1103-04.

Note: The annual hunting regulations provided for in § 20.104, 20.105, 20.106, 20.107 and 20.109 of 50 CFR Part 20 will not appear in the Code of Federal Regulations because of their seasonal nature.

#### § 20.105 [Amended]

2. The Service amends § 20.105 of 50 CFR Part 20 at 52 FR 35248 and 52 FR 36496 by removing footnote (2) for California.

Date: September 30, 1987.

William P. Horn,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 87-22937 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-55-M

#### 50 CFR Part 20

#### Migratory Bird Hunting: Zones in Which Lead Shot Will Be Prohibited for the Taking of Waterfowl, Coots and Certain Other Species in the 1987-88 Hunting Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule amendment.

SUMMARY: This final rule amendment describes zones, in which the use of lead shot is prohibited for hunting waterfowl, coots and certain other species in the 1987-88 season, that were omitted from the rulemaking dated Tuesday, July 21, 1987 (52 FR 27352). The zones described below for the State of Washington consist of (1) the same areas that were already identified as nontoxic shot zones for waterfowl and coot hunting in § 20.108 of Title 50 of the Code of Federal Regulations (50 CFR) for the 1986-87 hunting season and (2) the added counties identified for 1987-88 in Appendix N of the Final Supplemental Environmental Impact Statement on the Use of Lead Shot for Hunting Migratory Birds in the United States (see Table 1 in 52 FR 27352 Supplementary Information).

EFFECTIVE DATE: October 5, 1987.

FOR FURTHER INFORMATION CONTACT: Rollin D. Sparrowe, Chief, Office of Migratory Bird Management, U.S. and Wildlife Service, Room 536, Matomic Building, Washington, DC 20240 (202/254-3207).

SUPPLEMENTARY INFORMATION: Since 1978, the Fish and Wildlife Service (FWS) has not been able to implement or enforce nontoxic shot zones in a State without approval of the appropriate State authorities. This restriction on use

of funds by the FWS has been contained in the appropriations act for the Department of the Interior each year since 1978 (see, e.g., Pub. L. 98-473, sec. 305; Pub. L. 99-190, sec. 313; Pub. L. 99-591, sec. 317). As a consequence of this restriction, the FWS can only implement and enforce nontoxic shot zones for waterfowl and coot hunting with the approval of State authorities. If States do not approve nontoxic shot zones when current FWS guidelines and criteria indicate that such zones are necessary to protect migratory birds, the FWS will not open the areas to waterfowl and coot hunting. This action is taken pursuant to the FWS' responsibilities under the Migratory Bird Treaty Act, as amended (16 U.S.C. 703 *et seq.*; 40 Stat. 755) and, in the case of zones established for bald eagle protection, the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 through 1543; 87 Stat. 884), the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. 668 through 668d; 54 Stat. 250).

At the time that the parent rule for this amendment was published (referenced above) the State of Washington had not yet responded positively to the proposed rulemaking published Thursday, January 15, 1987 (52 FR 1636). This proposed rulemaking requested consent for the Service to implement and enforce nontoxic shot zones in Washington. (The background for this issue is given at 52 FR 27362.) Thus, in compliance with the Stevens amendment requirements and the Migratory Bird Treaty Act, the FWS advised the State of Washington in the July 21, 1987, final rule that " \* \* \* nontoxic shot zones described for the State of Washington \* \* \* will not be opened to waterfowl hunting in the 1987-88 waterfowl hunting season, barring timely consent to implement and enforce steel shot regulations." Subsequently, the Washington Department of Game was able to provide the required consent and the FWS is in this rulemaking, publishing the descriptions of Washington nontoxic shot zones. This consent serves to have nullified the FWS' intent to not open Washington waterfowl seasons in nontoxic shot zones as stated in the proposed rulemaking on frameworks for late season migratory bird hunting regulations published on Friday, August 14, 1987 (52 FR 30395), and allows opening those nontoxic shot areas to waterfowl hunting in the 1987-88 season. The final rule on late season frameworks that will effect an open season for Washington in these nontoxic shot zones and elsewhere is expected to



be published in mid- to late-September 1987.

#### Economic Effect

Executive Order 12291, "Federal Regulations," of February 17, 1981, requires the preparation of regulatory impact analyses for major rules. A major rule is one likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or significant adverse effects on the ability of United States-based enterprises to compete with foreign-based enterprises. The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) further requires the preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which includes small businesses, organizations and/or government jurisdictions.

In accordance with Executive Order 12291, a determination has been made that this rule is not a major rule. In accordance with the Regulatory Flexibility Act, a determination has been made that this rule, if implemented without adequate notice, could result in lead shot ammunition supplies for which there would be no local demand. Conversely, nontoxic shot zones could conceivably be established where little or no nontoxic shot ammunition would be available to hunters. The Service believes, however, that adequate notice has been provided and that sufficient supplies of nontoxic shot ammunition will be available to hunters. Therefore, this rule would not have a significant economic effect on a substantial number of small entities.

#### Paperwork Reduction Act

This rule will not result in the collection of information from, or place recordkeeping requirements on, the public under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

#### Environmental Considerations

Pursuant to the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)), a Final Environmental Statement (FES) on the use of steel shot for hunting waterfowl in the United States was published in 1976. As stated above, a supplement to the FES was completed in June 1986. In this supplement, pursuant to the Endangered Species Act, a section 7 consultation was done on the potential impacts of the provisions of this rule on bald eagles. The section 7 opinion concluded that implementation of the preferred alternative would not be likely to

jeopardize the continued existence of the bald eagle.

#### Authorship

The primary author of this rule is Keith A. Morehouse, Office of Migratory Bird Management, working under the direction of Rollin D. Sparrowe, Chief.

#### List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Transportation, Wildlife.

Accordingly, Part 20, Subpart B, Chapter I of Title 50 of the *Code of Federal Regulations* is amended as follows:

#### PART 20—[AMENDED]

1. The authority citation for Part 20 continues to read as follows:

**Authority:** Migratory Bird Treaty Act, sec. 3, Pub. L. 65-186, 40 Stat. 755 (16 U.S.C. 701-708h); sec. 3(h), Pub. L. 95-616, 92 Stat. 3112 (16 U.S.C. 712); Alaska Game Act of 1925, 43 Stat. 739, as amended, 54 Stat. 1103-04, unless otherwise noted.

2. Section 20.108 is amended by adding the Washington description under the Pacific Flyway to read as follows (the introductory paragraph is being republished):

#### § 20.108 Nontoxic shot zones.

The areas described within the States indicated below are designated for the purpose of § 20.21(j) as nontoxic shot zones for hunting waterfowl, coots and certain other species.

\* \* \* \* \*

#### Pacific Flyway

\* \* \* \* \*

#### Washington

1. Clark County, that portion north and/or east of State Highway 14 and I-5.
2. Franklin County, that portion east of State Highway 17.
3. Grant County, that portion east and/or south of State Highway 17 and US-2.
4. Skagit County, that portion east of I-5.
5. Southwestern Zone—Those portions of Skamania, Clark, Cowlitz, Wahkiakum, Grays Harbor and Pacific Counties south and west of the following line: Beginning at the Bonneville Dam, westerly on State Highway 14 to Vancouver, thence northerly on I-5 to Kelso, thence westerly on State Highway 4 to US 101, thence northerly on US 101 to Aberdeen, thence westerly on State Highway 109 to Ocean City, thence due west to the Pacific Ocean.
6. Puget Sound Zone—Those portions of Whatcom, Skagit, San Juan Island, Clallam, Jefferson, Kitsap, Mason, Thurston, Pierce, King and Snohomish Counties bounded by the following line: Beginning at I-5 on the Washington-British Columbia, Canada border, thence west, southerly and westerly along said border to a point due north of Neah Bay, thence due south to Neah Bay,

thence easterly on State Highway 112 to US-101, thence easterly and southerly on US-101 to I-5, thence northerly on I-5 to State Highway 538 near Mt. Vernon, thence easterly on State Highway 538 to State Highway 9, thence northerly on State Highway 9 to State Highway 20, thence westerly on State Highway 20 to I-5, thence northerly on I-5 to point of origin.

7. Columbia Basin Zone—Those portions of Benton, Klickitat, Franklin, Adams, Grant, Yakima, Chelan, Kittitas, Douglas, Lincoln, Okanogan and Walla Walla Counties bounded by the following line: Beginning at the Washington-Oregon State border on the Celilo 1 ridge on US-97, thence northerly on US-97 to State Highway 14, thence easterly on State Highway 14 to US-395/I-82, thence northerly on US-395/I-82 (formerly a continuation of State Highway 14) to Kennewick, thence westerly on State Highway 240, thence northerly on State Highway 240 to State Highway 24, thence westerly on State Highway 24 to US-97, thence northerly on US-97 to State Highway 155 at Omach, thence easterly and southerly on State Highway 155 to State Highway 174 at Grand Coulee, thence southeasterly on State Highway 174 to US-2, thence westerly on US-2 to State Highway 17, thence southerly on State Highway 17 to US-395, thence southerly on US-395 to US-12, thence southerly on US-12 and US-730 to the Oregon border (including the entire McNary National Wildlife Refuge), thence westerly along the Columbia River and the Washington-Oregon border to the point of origin.

Date: September 16, 1987.

Susan Recce,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 87-22935 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-55-M

#### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 217 and 227

[Docket No. 70227-7207]

#### Sea Turtle Conservation; Shrimp Trawling Requirements

**AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** The Secretary of Commerce issues this final rule to implement a technical amendment to the regulations requiring shrimp trawlers in the Gulf of Mexico and the Atlantic Ocean off the Southeastern United States to use measures to reduce the incidental catch and mortality of sea turtles in shrimp trawls. This rule changes the definitions of "inshore" and "offshore" to more



clearly delineate the two areas, and adds an additional "soft" turtle excluder device (TED) to the approved TEDs. The intended effect is to clarify the regulations and to increase the options of fishermen required to use TEDs.

**EFFECTIVE DATE:** October 1, 1987.

**FOR FURTHER INFORMATION CONTACT:**

Charles A. Oravetz, 813-893-3366,  
Charles Karnella, 202-673-5349, or  
David Cottingham, 202-377-5181.

**SUPPLEMENTARY INFORMATION:**

**a. Background**

The Secretary of Commerce issued a final rule on June 29, 1987 (52 FR 24244) which requires shrimp trawlers 25 feet and longer to use qualified turtle excluder devices (TEDs) in certain offshore waters of the Southeastern United States during certain times of the year and to limit trawl tow times to 90 minutes (or use TEDs) in inshore waters during these same times. Shrimp trawlers less than 25 feet in length are required to limit trawl tow times to 90 minutes in inshore and offshore waters during certain times.

The final rule was designed to reduce the incidental catch and mortality of sea turtles in shrimp trawls. The rule allows the use of four types of TEDs. It also contains a provision for qualification of new TEDs if these TEDs are tested according to procedures specified in the rule and found to be 97 percent effective in releasing sea turtles from trawls.

**b. Soft TED Testing**

In June 1987, the University of Georgia Sea Grant program tested three soft (i.e., made of flexible material) TEDs in the Cape Canaveral, Florida, Navigation Channel. The tests were conducted under NMFS supervision according to a research protocol developed by the NMFS. Of the three soft TEDs tested, one was found to effectively release sea turtles.

This TED, commonly called the Morrison soft TED or the Morrison TED, is a one or three piece webbing panel that is inserted inside a shrimp trawl at approximately a 25 degree angle from the horizontal when the trawl is deployed. One or three panels are used depending on the configuration of the trawl. Turtles are released through a 56-60 inch long opening in the top of the trawl. The Morrison TED is constructed of number 42 (3 millimeters) polypropylene webbing with 8 inch meshes (stretched measure). The main panel and side panels (jibs) can be modified in size depending on the size and design of the trawl used.

During the Canaveral testing in 15 forty-five minute tows, the trawl equipped with the Morrison soft TED

did not catch any turtles but the control trawl (without a TED) caught 42 turtles. These catch rates satisfied the requirements for a 97 percent turtle exclusion rate at the 90 percent confidence level.

Based on the performance at Canaveral, Georgia Sea Grant and NMFS gear specialists believe the reason that the Morrison soft TED worked while other very similar devices did not work well is that the exit opening for the Morrison TED is an open slit in the webbing whereas the opening for other TEDs was covered by a webbing flap. Additionally, the arrangement of the meshes in a diamond pattern and at a shallow angle reduces the likelihood of turtles becoming entangled in the webbing.

Shrimp trawls are generally constructed of nylon twine and dipped in a preservative to prolong life. Net dips are usually green, black or blue in color. The polypropylene used in the Morrison TED is colored blue, light green or orange. If the Morrison TED is installed in the trawl before dipping it will to some degree take on the same color as the trawl and be difficult to distinguish from the trawl.

These rules require that the Morrison soft TED be constructed of untreated number 42 (3 millimeters thick) or larger braided or heat-set knotted polypropylene of a different color from the trawl, e.g., orange/green; green/black; blue/green; orange/blue; green/blue.

**c. Inshore and Offshore Definition**

In the final rule, "Inshore" was defined as marine or tidal waters landward of the baseline from which the territorial sea of the United States is measured and marine or tidal waters on the mainland side of any baseline on offshore islands. "Offshore" was defined as waters seaward of the baseline from which the territorial sea of the United States is measured.

These definitions left doubt as to the closing lines across passes such as at Mississippi, Breton, and Chandeleur Sounds in the northern Gulf of Mexico. To eliminate this confusion this rule defines Offshore and Inshore using the 72 COLREGS (International Regulations for Preventing Collisions at Sea, 1972) demarcation line. This line is depicted or noted on NOAA Coast Charts of 1:80,000 scale for the Atlantic and Gulf of Mexico and is described in 33 CFR Part 80. Most shrimpers affected by these regulations use NOAA nautical charts for navigation. The 72 COLREGS demarcation line is slightly less restrictive than the baseline demarcation and will assist shrimpers in

more readily identifying areas where restrictions apply.

**Classification**

This action is in compliance with Executive Order 12291. Notice and comment on this final rule are unnecessary and contrary to the public interest because it makes no significant change in the boundaries of "inshore" and "offshore", but it merely reduces slightly the area where TEDs are required and provides more convenient delineation. It would be contrary to the public interest to delay the effect of this technical amendment beyond the effective date of the rule it amends (52 FR 24244). Delayed effectiveness is not required because this technical amendment relieves a restriction.

Addition of the Morrison soft TED gives the public notice that it has passed the test and may be used lawfully.

As no statute requires notice and comment on this final rule, it is not subject to the Regulatory Flexibility Act requirement for a regulatory flexibility analysis and none has been prepared.

The rule does not contain a collection-of-information requirement for purpose of the Paperwork Reduction Act.

**List of Subjects in 50 CFR Parts 217 and 227**

Endangered species, Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: September 30, 1987.

Bill Powell,

Executive Director, National Marine Fisheries Service.

For the the reasons set out in the preamble, 50 CFR Parts 217 and 227 are amended as follows:

**PART 217—GENERAL PROVISIONS**

1. The authority citation for Part 217 continues to read as follows:

Authority: 16 U.S.C. 1521-1543 and 16 U.S.C. 742a *et seq.*

2. In § 217.12, the definitions for "Inshore" and "Offshore" are revised to read as follows:

**§ 217.12 Definitions.**

"Inshore" means marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR Part 80.

\* \* \* \* \*



"Offshore" means marine and tidal waters seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR Part 80.

## PART 227—THREATENED FISH AND WILDLIFE

3. The authority citation for Part 227 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

4. In § 227.72, a new paragraph (e)(4)(ii)(E) is added to read as follows:

### § 227.72 Exceptions to prohibitions.

(e) \* \* \*

(4) \* \* \*

(ii) \* \* \*

(E) *Morrison TED* (Figure 5). In the Morrison TED, webbing is substituted for the rigid deflector grids used in the TEDs described above. The webbing consists of number 42 (3 millimeters thick) or larger polypropylene, heat-set knotted or braided. The polypropylene must be untreated and of a color easily distinguished from the trawl net. The stretched opening of the mesh may not exceed 8". Depending on the trawl net type, the webbing may be installed as one panel or as a main and two side (jib) panels (Figure 6). In either case, the webbing must form a complete barrier to large objects inside the trawl net forward of the cod end. The base of the

webbing must be attached to the trawl net not less than 16'8" forward of the point at which the cod end is attached to the trawl net. The apex of the webbing must be attached to the top center of the trawl net not more than 20" forward of the point at which the cod end is attached to the trawl net. Each point on the circumference of the webbing must be attached to the trawl net. The meshes of the webbing must be under tension when the cod end is pulled aft thus forming diamond patterns pointing toward the top of the trawl net. As an escape hole, a slit at least 4'8" in length must be cut in a fore and aft direction at the top of the trawl net immediately forward of the apex of the webbing. The slit may not be covered or closed in any manner.

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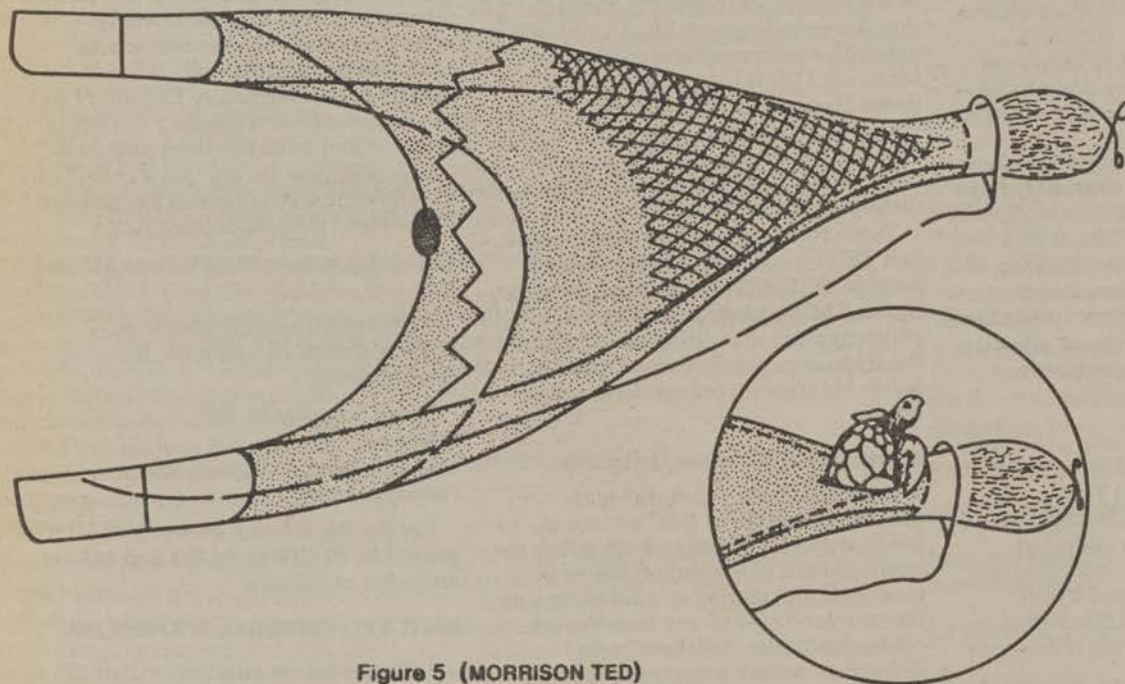


Figure 5 (MORRISON TED)

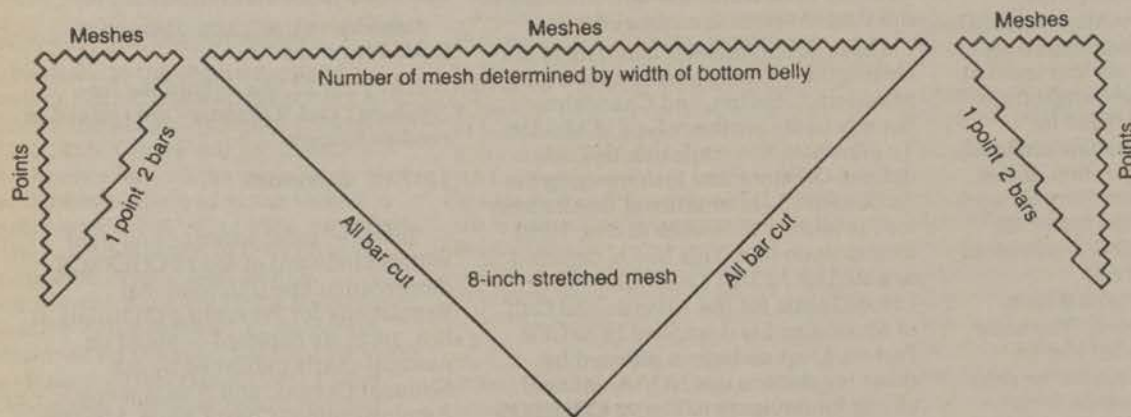


Figure 6 SCHEMATIC EXAMPLE OF MORRISON TED'S MAIN PANEL & JIBS

[FR Doc. 87-22971 Filed 10-1-87; 10:08 am]

BILLING CODE 3510-22-C



## 50 CFR Part 267

[Docket No. 40556-7063]

## United States Standards for Grades of North American Freshwater Catfish and Products Made Therefrom

AGENCY: National Marine Fisheries Service, (NMFS), NOAA, Commerce.

ACTION: Final rule.

**SUMMARY:** NOAA issues a final rule to establish grading standards for North American catfish and products made therefrom. These Standards for Grades provide a system to classify North American catfish and products made therefrom by quality into three U.S. Grade categories, A, B, and C. The intended effect is to permit identification of such quality levels on the product or product label for the benefit of the consumer and the industry. These Standards for Grades are intended to be used in a voluntary program of fishery products inspection and certification by NMFS.

**EFFECTIVE DATES:** The regulation is effective November 4, 1987. The incorporation by reference of the publications listed in the regulation is approved by the Director of the Federal Register as of November 4, 1987.

**FOR FURTHER INFORMATION CONTACT:** Tom Moreau, Technical Services Unit, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Emerson Avenue, Jones-Hunt Building, Gloucester, MA 01930, Phone 617-281-3600, ext. 319.

**SUPPLEMENTARY INFORMATION:** These Standards for Grades provide a system for Federal and State inspectors to classify North American catfish and products made therefrom by quality into three U.S. Grade categories (i.e., A, B, and C) and allow identification of the product quality level for the benefit of the consumer and the industry.

These Standards for Grades are expected to facilitate trade in North American freshwater catfish and products made therefrom. They will allow consumers to select purchases of a greater variety of products on the basis of identified quality.

These Standards for Grades were published as an interim rule with request for comments in the *Federal Register*, Thursday, July 5, 1984, 49 FR 27514. Two corrections were published September 24, 1984, 49 FR 37423. No formal comments were received in response to these notices. These Standards for Grades were used to

examine over 2,000 sample units of various catfish products before August 1985. The results indicate that these Standards for Grades are workable without major alteration. Some editorial changes have been made to increase their readability. For example, reference is made to the Fourteenth edition (1984) of "Official Methods of Analysis" of the Association of Official Analytical Chemists instead of the Thirteenth edition (1980).

Because of the high level of interest expressed for the availability of these standards, the NMFS intends to use them in its voluntary program of fishery products inspection and certification.

## Classification

The NOAA Administrator has reviewed this final rule in accordance with Executive Order 12291 and has determined that it is not a "major rule" since promulgation of these voluntary Standards for Grades will have no significant adverse effect on the economy, costs or prices, and no impact on competition, employment, investment or productivity. Accordingly, a regulatory impact analysis is not required.

The General Counsel certified that this rule will not have a significant economic impact on a substantial number of small entities because this rule applies to voluntary participants in the seafood inspection and grading program. As a result, a regulatory flexibility analysis was not prepared.

This contains no information collection requirements as defined by the Paperwork Reduction Act.

The Department has determined that this regulation will not significantly affect the quality of the human environment so therefore no draft or final Environmental Impact Statement was prepared.

The Department has determined that this final rule does not directly affect the coastal zone of any State with an approved coastal zone management program.

## List of Subjects in 50 CFR Part 267

Food grades and standards, Seafood, Incorporation by Reference.

Dated: September 29, 1987.

Bill Powell,

Executive Director, National Marine Fisheries Service.

For the reasons set forth in the preamble, a new Part 267 is added to Chapter II of 50 CFR as follows:

## PART 267—UNITED STATES STANDARDS FOR GRADES OF NORTH AMERICAN FRESHWATER CATFISH AND PRODUCTS MADE THEREFROM

Sec.	
267.101	Scope and product description.
267.102	Product presentation.
267.103	Grades.
267.104	Grade determination.
267.105	Tolerances for lot certification.
267.106	Hygiene.
267.107	Methods of analysis.

## Table 1—Defect Table

Authority: 16 U.S.C. 742e; 7 U.S.C. 1622, 1624.

## § 267.101 Scope and product description.

(a) These U.S. Standards for Grades apply to products derived from farm-raised, or from rivers and lakes, North American freshwater catfish of the following common commercial species and hybrids thereof:

- (1) Channel catfish (*Ictalurus punctatus*)
- (2) White catfish (*Ictalurus catus*)
- (3) Blue catfish (*Ictalurus furcatus*)
- (4) Flathead catfish (*Pylodictis olivaris*)

(b) Fresh products will be packaged in accordance with good commercial practices and maintained at temperatures necessary for the preservation of the product. Frozen products will be frozen to 0°F (−18°C) at their center (thermal core) in accordance with good commercial practices and maintained at temperatures of °F (−18°C) or less.

(c) These Standards for Grades will be implemented in accordance with the guidance set forth in Part II of NOAA Handbook 25, "Inspectors Instructions for Grading North American Freshwater Catfish and Products Made Therefrom".

## § 267.102 Product presentation.

Catfish products may be presented and labeled as follows:

- (a) Types;
  - (1) Fresh, or
  - (2) Frozen.
- (b) Styles;
  - (1) Skin on, or
  - (2) Skinless.
- (c) Market forms include but are not limited to the following:

- (1) Headed and gutted.
- (2) Headed and dressed are headed and gutted usually with fins removed. This form may be presented with or without the dorsal spine and with or without the collar bone.
- (3) Whole fillets are practically boneless pieces of fish cut parallel to the entire length of the backbone with the belly flaps and with or without the black membrane.



(4) Trimmed fillets are whole fillets without belly flaps.

(5) Fillet strips are strips of fillets weighing not less than  $\frac{3}{4}$  ounce.

(6) Steaks are units of fish not less than  $1\frac{1}{2}$  ounces in weight which are sawn or cut approximately perpendicular (30 degrees to 90 degrees) to the axial length or backbone. They have two reasonably parallel surfaces. The number of tail sections that may be included in the package must not exceed the number of fish cut per package).

(7) Nuggets are pieces of belly flaps with or without black membrane and weighing not less than  $\frac{3}{4}$  ounce.

#### § 267.103 Grades.

(a) U.S. Grade A fresh or frozen products will possess good flavor and odor and be within the limits specified for defects for U.S. Grade A quality in § 267.104 of this part.

(b) U.S. Grade B fresh or frozen products will possess reasonably good flavor and odor and be within the limits specified for defects for U.S. Grade B quality in § 267.104 of this part.

(c) U.S. Grade C fresh or frozen products will possess reasonably good flavor and odor and be within the limits specified for defects for U.S. Grade C quality in § 267.104 of this part.

#### § 267.104 Grade determination.

(a) *Procedures for grade determination.* The grade will be determined by evaluating the fresh product in the fresh and cooked states or the frozen product in the frozen, thawed, and cooked states in accordance with applicable paragraphs in this section.

(b) *Sampling.* Lot size, number of sample units, and acceptance numbers will be selected in accordance with § 260.61 of this chapter, Tables II, V, or VI as applicable. A sample unit consists of 10 "portions" for market forms (1) and (2) as defined in § 267.102(c) of this part, or at least 2 pounds of "portions" for market forms (3) through (7). "Portion" is one unit of any of the market forms.

(c) *Evaluation of flavor and odor.*—(1) *Definition of flavor and odor* (i) Good flavor and odor (minimum requirements for a Grade A product) mean that the product has the normal, pleasant flavor and odor characteristics of the species, and it is free from off-odors and off-flavors of any kind.

(ii) Reasonably good flavor and odor (minimum requirements of Grade B and Grade C products) mean that the product may be somewhat lacking in good flavor and odor characteristics of the species but it is free from objectionable off-odors and off-flavors of any kind.

(2) *Procedure.* For raw odor evaluation, frozen portions are thawed. Fresh or thawed portions are broken apart and the exposed flesh immediately held close to the nose to detect any off-odors. To evaluate cooked flavor and odor, cook the sample units using the procedure referenced in § 267.107 of this part.

(d) *Examination for physical defects.* Each sample unit will be examined for physical defects using the defect definitions that follow. Deduction points are assigned in accordance with Table I.

(1) *Dehydration* applies to all frozen market forms. It refers to the loss of moisture from the surface resulting in a whitish, dry, or porous condition:

(i) *Slight:* surface dehydration which is not color masking (readily removed by scraping) and affecting 3 to 10 percent of the surface area.

(ii) *Moderate:* deep dehydration which is color masking, cannot be scraped off easily with a sharp instrument, and affects more than one percent but not more than 10 percent of the surface area.

(iii) *Excessive:* deep dehydration which is color masking, and cannot be easily scraped off with a sharp instrument and affects more than 10 percent of the surface area.

(2) *Condition of the product* applies to all market forms. It refers to freedom from packaging defects, cracks in the surface of a frozen product, and excess moisture (drip) or blood inside the package. Deduction points are based on the degree of this defect.

(i) *Slight* refers to a condition that is scarcely noticeable but that does not affect the appearance, desirability or eating quality of the product.

(ii) *Moderate* refers to a condition that is conspicuously noticeable but that does not seriously affect the appearance, desirability, or eating quality of the product.

(iii) *Excessive* refers to a condition that is conspicuously noticeable and that does seriously affect the appearance, desirability or eating quality of the product.

(3) *Discoloration* applies to all market forms. It refers to colors not normal to the species. This may be due to mishandling or the presence of blood, bile, or other substances.

(i) *Slight:*  $\frac{1}{16}$  square inch up to and including one square inch in aggregate area.

(ii) *Moderate:* greater than one square inch up to and including 2 square inches in aggregate area.

(iii) *Excessive:* over 2 square inches in aggregate area. Also, each additional complete one square inch is again assessed points under this category.

(4) *Uniformity* applies to size or weight controlled products. It refers to the degree of uniformity of the weights of the portions in the container. It is obtained by weighing individual portions to determine their conformity to declared weights. Uniformity will be assigned in accordance with weight tolerances as follows:

#### Weight of portion

0.75 to 4.16 ounces

Moderate: Over  $\frac{1}{4}$  ounce but not over  $\frac{1}{2}$  ounce above or below declared weight of portion

Excessive: In excess of  $\frac{1}{4}$  ounce above or below declared weight of portion

4.17 to 11.20 ounces

Moderate: Over  $\frac{1}{2}$  ounce but not over  $\frac{3}{4}$  ounce above or below declared weight of portion

Excessive: In excess of  $\frac{1}{2}$  ounce above or below declared weight of portion

11.21 to 17.30 ounces

Moderate: Over  $\frac{3}{4}$  ounce but not over 1 ounce above or below declared weight of portion

Excessive: In excess of  $\frac{3}{4}$  ounce above or below declared weight of portion

(5) *Skinning cuts* apply to skinless market forms. It refers to improper cuts made during the skinning operation as evidenced by torn or ragged surfaces or edges, or gouges in the flesh which detract from a good appearance of the product.

(i) *Slight:*  $\frac{1}{16}$  square inch up to and including 1 square inch in aggregate area.

(ii) *Moderate:* Over one square inch up to and including 2 square inches in aggregate area.

(iii) *Excessive:* Over 2 square inches in aggregate area. Also, each additional complete one square inch is again assessed points under this category.

(6) *Heading* applies to market forms (1) and (2) as defined in § 267.102(c) of this part. It refers to the presence of ragged cuts or pieces of gills, gill cover, pectoral fins or collar bone after heading. Deduction points also will be assigned when the product is presented with the collar bone and it has been completely or partially removed.

(i) *Slight:*  $\frac{1}{16}$  square inch up to and including one square inch in aggregate area.

(ii) *Moderate:* Over one square inch up to and including 2 square inches in aggregate area.

(iii) *Excessive:* Over 2 square inches in aggregate area. Also, each additional complete one square inch is again assessed points under this category.

(7) *Evisceration* applies to all market forms. It refers to the proper removal of viscera, kidney, spawn, blood, reproductive organs, and abnormal fat



(leaf). The evisceration cut should be smooth and clean. Deduction points are based on the degree of defect.

(i) *Slight*:  $\frac{1}{16}$  square inch up to and including 1 square inch in aggregate area.

(ii) *Moderate*: Over 1 square inch up to and including 2 square inches in aggregate area.

(iii) *Excessive*: Over 2 square inches in aggregate area. Also, each additional complete one square inch is again assessed points under this category.

(8) *Fins* refer to the presence of fins, pieces of fins or dorsal spines. It applies to all market forms except headed and gutted or headed and dressed catfish or catfish steaks. Deduction points also will be assigned when the product is intended to have the dorsal spine but it has been completely or partially removed.

(i) *Slight*: Aggregate area up to including one square inch.

(ii) *Moderate*: Over one square inch area up to and including 2 square inches.

(iii) *Excessive*: Over 2 square inches in aggregate area. Also, each additional complete one square inch is again assessed points under this category.

(9) *Bones* (including pin bone) apply to all fillet and nugget market forms. Each bone defect is a bone or part of a bone

that is  $\frac{3}{16}$  inch or more at its maximum length or  $\frac{1}{32}$  inch or more at its maximum shaft width, or for bone chips, a length of at least  $\frac{1}{16}$  inch. An excessive bone defect is any bone which cannot be fitted into a rectangle, which has a length of  $1\frac{1}{16}$  inch and a width of  $\frac{3}{8}$  inch.

(10) *Skin* refers to the presence of skin on skinless market forms. For semi-skinned forms, a skin defect is the presence of the darkly pigmented outside layers. Points will be assessed for each aggregate area greater than  $\frac{1}{2}$  square inch up to and including one square inch.

(11) *Bloodspots* refer to the presence of coagulated blood. *Bruises* refer to softening and discoloration of the flesh. Both bloodspots and bruises apply to all market forms. Points will be assessed for each aggregate area of bloodspots or bruises greater than  $\frac{1}{2}$  square inch up to and including one square inch.

(12) *Foreign material* refers to any extraneous material, including packaging material, not derived from the fish that is found on or in the sample. Each occurrence will be assessed.

(13) *Texture* applies to all market forms and refers to the presence of normal texture properties of the cooked fish flesh, i.e., tender, firm, and moist without excess water. Texture defects

are described as dry, tough, mushy, rubbery, watery, and stringy.

(i) *Moderate*: Noticeably dry, tough, mushy, rubbery, watery, stringy.

(ii) *Excessive*: Markedly dry, tough, mushy, rubbery, watery, stringy.

(e) *Listing defect points*. Each sample unit is examined for physical defects, using the list of definitions given in this section. The point deductions for defects are listed for each sample unit, and the point values totaled. The total of the defect points determines the sample unit grade. The scoring system is based on a perfect score of zero.

(f) *Grade assignment*. Each sample unit will be assigned a grade in accordance with the limits for defects summarized as follows:

Grade assignment	Flavor and odor	Maximum number of defect points
U.S. Grade A.....	Good.....	15
U.S. Grade B.....	Reasonably Good.....	30
U.S. Grade C.....	Reasonably Good.....	40

If a sample unit has been assigned a grade for flavor and odor different than the grade indicated by the number of defect points, the sample unit grade will be the lower grade.

TABLE I.—DEFECT TABLE SCHEDULE OF POINT DEDUCTIONS OF NORTH AMERICAN FRESHWATER CATFISH AND PRODUCTS MADE THEREFROM

[Per sample unit unless otherwise indicated]

Scored factors	Degree of quality variation	Point value
<b>Frozen Products</b>		
(1) Dehydration:		
Each occurrence affecting 3 to 10% of surface area but readily removed by scraping.....	Slight.....	5
Affecting more than 1% but not more than 10% of surface area and cannot be easily removed by scraping.....	Moderate.....	16
Affecting more than 10% of surface area and cannot be easily removed by scraping.....	Excessive.....	30
<b>Fresh or Frozen Products</b>		
(2) Condition of product (pertains to the entire package or container).....	Slight.....	1
	Moderate.....	3
	Excessive.....	5
(3) Discoloration:		
$\frac{1}{16}$ sq. in. to 1 sq. in.....	Slight.....	4
Over 1 sq. in. to 2 sq. in.....	Moderate.....	9
Over 2 sq. in. and each additional complete 1 sq. in.....	Excessive.....	15
(4) Uniformity: Deviation above or below declared weight of portion—		
Weight of portion—Moderate:		
0.75 to 4.16 oz.....	Over $\frac{1}{8}$ but not over $\frac{1}{4}$ oz.....	5
4.17 to 11.20 oz.....	Over $\frac{1}{4}$ but not over $\frac{1}{2}$ oz.....	5
11.21 to 17.30 oz.....	Over $\frac{1}{2}$ but not over $\frac{3}{4}$ oz.....	5
Weight of portion—Excessive		
0.75 to 4.16 oz.....	Over $\frac{1}{4}$ oz.....	10
4.17 to 11.20 oz.....	Over $\frac{1}{2}$ oz.....	10
11.21 to 17.30 oz.....	Over $\frac{3}{4}$ oz.....	10



TABLE 1.—DEFECT TABLE SCHEDULE OF POINT DEDUCTIONS OF NORTH AMERICAN FRESHWATER CATFISH AND PRODUCTS MADE THEREFROM—Continued

[Per sample unit unless otherwise indicated]

Scored factors	Degree of quality variation	Point value
<b>Fresh or thawed products</b>		
(5) Skinning cuts [skinless market forms only]:		
1/16 sq. in. to 1 sq. in.	Slight	1
Over 1 sq. in. to 2 sq. in.	Moderate	3
Over 2 sq. in. and each additional complete 1 sq. in.	Excessive	8
(6) Heading (H&G or H&D fish only):		
1/16 sq. in. to 1 sq. in.	Slight	5
Over 1 sq. in. to 2 sq. in.	Moderate	16
Over 2 sq. in. and each additional complete 1 sq. in.	Excessive	30
(7) Evisceration:		
1/16 sq. in. to 1 sq. in.	Slight	5
Over 1 sq. in. to 2 sq. in.	Moderate	16
2 sq. in. or over	Excessive	30
(8) Fins:		
Up to 1 sq. in.	Slight	1
Over 1 sq. in. to 2 sq. in.	Moderate	5
Over 2 sq. in.	Excessive	10
(9) Bones (including pin bone):		
Bones: 1/16 in. long or 1/32 in. wide	Each occurrence	5
Bone chip: 1/16 in. long	Each occurrence	5
Excessive: 1 1/16 in. long by 3/8 in. wide rectangle	Each occurrence	10
(10) Skin (skinless market forms only): Over 1/2 sq. in. to 1 sq. in.	Each occurrence	5
(11) Bloodspots, bruises: Over 1/2 sq. in. to 1 sq. in.	Each occurrence	5
(12) Foreign matter: Harmless material	Each occurrence	4
<b>Cooked products</b>		
(13) Texture	Moderate	5
	Excessive	16

**§ 267.105 Tolerances for lot certification.**

(a) The grade assigned to a lot is the grade indicated by the majority of the sample unit grades provided that the number of sample units in the next lower grade does not exceed the acceptance number as given in the sampling plans contained in § 260.61 of this chapter. All of the sample units must meet the provisions of § 260.21 of this chapter. In § 260.21, the 4 score points are additive, not subtractive.

(b) The grade assigned to a lot is one grade below the majority of all the sample unit grades if either:

(1) The number of sample units in the next lower grade does exceed the acceptance number as given in the sampling plans contained in § 260.61 of this chapter, or

(2) The grade of any one of the sample units is more than one grade below the majority of all the sample unit grades.

**§ 267.106 Hygiene.**

Products will be processed in official establishments as defined in § 260.6 of this chapter and maintained in accordance with §§ 267.101 to 267.107 of

this part and of the good manufacturing practice regulations contained in 21 CFR Part 110.

**§ 267.107 Methods of analysis.**

Product samples will be analyzed in accordance with the "Official Methods of Analysis of the Association of Official Analytical Chemists", (AOAC), Fourteenth Edition (1984), section 18.004 (page 331) and sections 32.059 and 32.060 (page 613) which are incorporated by reference. Copies of the AOAC methods may be obtained from AOAC, 1111 North Nineteenth Street, Arlington, VA 22209 and are available for inspection at the Office of the Federal Register, 1100 L Street, Room 8401 Washington, DC. This incorporation by reference was approved by the Director of the Federal Register on November 4, 1987. These methods are incorporated as they exist on the date of this approval. A notice of any change in the sections of the AOAC methods cited herein will be published in the **Federal Register**.

[FR Doc. 87-22888 Filed 10-2-87; 8:45 am]

BILLING CODE 3510-22-M

**50 CFR Part 651**

[Docket No. 70620-7184]

**Northeast Multispecies Fishery; Corrections**

**AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.

**ACTION:** Final rule; corrections.

**SUMMARY:** This document corrects several typographical errors in the regulatory text of the final rule to implement Amendment 1 to the Fishery Management Plan for the Northeast Multispecies Fishery. This rule was published September 17, 1987 (52 FR 35093).

**EFFECTIVE DATE:** October 1, 1987.

**FOR FURTHER INFORMATION CONTACT:** Peter D. Colosi, Jr. (Multispecies Plan Coordinator), 617-281-3600, ext. 252.

**PART 651—[AMENDED]**

In rule document 87-21389 beginning on page 35093 in the issue of September 17, 1987, make the following corrections:



**§ 651.3 [Corrected]**

1. In § 651.3, paragraph (c), line 2, remove "or local" after "State".

**§ 651.23 [Corrected]**

2. In § 651.23, paragraph (a)(1), in the small table, line 1, remove "Beyond" before "Cod".

**§ 651.25 [Corrected]**

3. In § 651.25, paragraph (a), line 6, "bouys" is corrected to read "buoys".

4. In the same section, paragraph (b), line 9, "eastern most" is corrected to be one word reading "easternmost".

Authority: 16 U.S.C. 1801 et seq.

Dated: September 30, 1987.

**Bill Powell,**

*Executive Director, National Marine Fisheries Service.*

[FR Doc. 87-22972 Filed 10-2-87; 8:45 am]

**BILLING CODE 3510-22-M**



# Proposed Rules

Federal Register

Vol. 52, No. 192

Monday, October 5, 1987

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR Part 1405

#### Loans, Purchases and Other Operations

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend 7 CFR Part 1405 to set forth the manner in which the rate of interest that is generally applicable to Commodity Credit Corporation (CCC) loans will be determined and announced. This proposed rule would also delete obsolete references to the ability of trustees to pledge commodities as collateral for CCC loans or to sell such commodities to CCC.

**DATE:** Comments must be received on or before November 4, 1987, in order to be assured of consideration.

**ADDRESS:** Send comments to David Nichols, Supervisory Systems Account, Fiscal Division, ASCS, U.S. Department of Agriculture, P.O. Box 2415, Washington, DC 20013 447-6616.

**FOR FURTHER INFORMATION CONTACT:** David Nichols, Supervisory Systems Account, Fiscal Division, ASCS, U.S. Department of Agriculture, P.O. Box 2415, Washington, DC 20013 (202) 447-6616.

**SUPPLEMENTARY INFORMATION:** This notice has been reviewed in conformance with Executive Order 12291 and the Secretary's Memorandum 1521-1 and has been classified as "not major." It has been determined that the provisions of this notice will not result in: (1) An annual effect on the economy of \$100 million or more; (2) major increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (3) significant adverse effects on

competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprise to compete with foreign-based enterprise in domestic or export markets.

This program/activity is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 291115 (June 29, 1983).

The titles and numbers of the Federal Domestic Assistance Programs that this notice applies to are: Commodity Loans and Purchases—10.051; Cotton Production Stabilization—10.055; Storage Facilities and Equipment Loans—10.056; Wheat Production Stabilization—10.058; Rice Production Stabilization—10.065 as found in the Catalog of Federal Domestic Assistance.

#### Background

A large portion of CCC's activities involves the making of loans to eligible program participants. Most significantly, these loans include nonrecourse price support loans made to producers in accordance with the Agricultural Act of 1949, as amended, and the CCC Charter Act, as amended. With respect to CCC loans, CCC assesses interest from the date of disbursement until repayment by the borrower. The rate of interest is the rate charged CCC by the U.S. Treasury for funds borrowed by CCC on the date a loan is disbursed by CCC. This rate is applicable to the loan until the following January 1. If the loan is outstanding as of the following January 1, the rate of interest is adjusted to the rate that is charged by the U.S. Treasury on CCC borrowings as of that date.

7 CFR 1405.1 provides that program provisions which require that the beneficial interest in a commodity must be in the producer offering the commodity for sale or as loan collateral shall not be interpreted as excluding a trustee from participating in a price support program. Since this is the longstanding position of CCC and is reflected in program contracts and regulations, it has been determined that this provision is no longer necessary.

Accordingly, this proposed rule would delete this provision.

Accordingly, it is proposed that 7 CFR Part 1405 be revised as follows:

#### PART 1405—LOANS, PURCHASES AND OTHER OPERATIONS

Sec.

1405.1 Interest.

1405.2 Basic rule of fractions.

**Authority:** Secs. 4 and 5 of the Charter Act, as amended, 62 Stat. 1070, as amended, 1072 (15 U.S.C. 714b and 714c).

#### § 1405.1 Interest.

(a) *General.* Except as may otherwise be determined by CCC as provided in individual program regulations, program contracts or such other means as deemed appropriate by CCC, interest shall be assessed as provided in this Part with respect to loans disbursed by CCC.

(b) *Rate in effect on disbursement.* The rate of interest that is applicable to CCC loans shall be equal to the rate charged by the U.S. Treasury for funds borrowed by CCC on the date the loan is disbursed by CCC. This rate of interest shall be in effect until the earlier of maturity of the loan or the next January 1.

(c) *Rate in effect as of January 1.* The rate of interest applicable to all CCC loans that are outstanding as of January 1 of any year shall be adjusted as of such date to equal the rate of interest charged by the U.S. Treasury for funds borrowed by CCC on such date. This rate shall be in effect until the earlier of the maturity of the loan or the next January 1. The rate of interest applicable to CCC loans as of January 1 of any year shall be announced by CCC by press release or other means.

#### § 1405.2 Basic rule of fractions.

Fractions shall be rounded in accordance with the provisions of 7 CFR Part 793.

Signed at Washington, DC on September 29, 1987.

Milton Hertz,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 87-22953 Filed 10-2-87; 5:45 am]

BILLING CODE 3410-05-M



# DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Social Security Administration

### 20 CFR Part 404

[Regulations No. 4]

## Federal Old-Age, Survivors, and Disability; Determining Disability and Blindness Down Syndrome Evaluation

AGENCY: Social Security Administration, HHS.

ACTION: Proposed rules.

**SUMMARY:** These proposed revisions to the medical criteria in the Listing of Impairments in Appendix 1 of Subpart P add a new Listing 110.06 to the Multiple Body Systems in Part B to provide for evaluation of Down syndrome claims according to the impairment criteria for the major system affected. These proposed changes also revise the introductory material in Listing section 110.00 to better identify what is meant by the term catastrophic congenital abnormalities or disease and to describe a level of severity which is considered sufficient to find a person disabled by these abnormalities or diseases.

**DATE:** Comments must be received on or before December 4, 1987.

**ADDRESSES:** Comments should be submitted in writing to the Commissioner of Social Security, Department of Health and Human Services, P.O. Box 1585, Baltimore, Maryland 21203, or delivered to the Office of Regulations, Social Security Administration, 3-B-4 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235, between 8:00 a.m. and 4:30 p.m. on regular business days. Comments may be inspected during these same hours by making arrangements with the contact person shown below.

**FOR FURTHER INFORMATION CONTACT:** Harry J. Short, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235, Telephone (301) 594-7337.

### SUPPLEMENTARY INFORMATION:

Throughout this preamble and the regulatory text we refer to the subject impairment as "Down syndrome" rather than "Down's syndrome." "Down" without the apostrophe "s" is the term currently being used by the National Down Syndrome Congress and the National Down Syndrome Society and is used in several major texts on childhood disability. We propose to provide for the evaluation of Down syndrome in the multiple body system category of

impairments in Part B of the Listing of Impairments. The purpose of establishing a listing is to simplify the evaluation process, not to change how disability is determined for Down syndrome claims. Part A of the Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity, absent evidence to the contrary. Part B contains additional medical criteria that apply only to the evaluation of impairments of persons under age 18. Some children with Down syndrome may be evaluated under the criteria of Listing 112.05-Mental retardation-of Part B of the Listing of Impairments. However, when mental retardation is the only impairment, we are often unable to determine the severity of Down syndrome in infants and very young children since there are no psychometric instruments which accurately measure their intellectual functioning. Consideration of the extent of the attainment of developmental milestones is generally of limited value because the attainment of milestones by severely retarded and less retarded young infants shows wide variation.

Almost all children with Down syndrome have moderate to severe neuromusculoskeletal abnormalities, and many have other malformations such as cardiac, gastrointestinal, oral/facial, skeletal. These abnormalities are usually less problematical than mental and developmental impairments and we believe it is more appropriate to evaluate those abnormalities under the criteria of the affected body system(s). We, therefore, propose to add a new Listing 110.06 under the Multiple Body Systems Listing § 110.00 to provide for evaluation of Down syndrome claims according to the impairment criteria for the major system affected.

We also propose to revise the introductory material in Listing section 110.00 to better identify what is meant by catastrophic congenital abnormalities or diseases and describe a level of severity which is considered sufficient to find a person disabled by these abnormalities or diseases. We have expanded the introduction by including several major congenital abnormalities that do not fall into the "catastrophic" category described in Listing 110.08. The purpose of this expansion is to simplify the evaluation process, not to change how disabilities are determined. We believe these changes will help assure greater uniformity and equity in the adjudicative process for children with conditions that usually affect more than one body system. We do not propose

similar changes to Part A of the Listing of Impairments. Part A contains medical criteria generally applied to persons age 18 or over. We have experienced little difficulty evaluating claims involving Down syndrome and other congenital abnormalities or disease in adults (age 18 and over) since these claims may be readily evaluated under the criteria of the affected body system(s), e.g. mental, musculoskeletal, cardiac.

### Regulatory Procedures

#### Executive Order 12291

The Secretary has determined that this is not a major rule under Executive Order 12291 because the proposed changes will have little, if any, impact on costs. Therefore, a regulatory impact analysis is not required.

#### Paperwork Reduction Act

These proposed regulations will impose no new reporting or recordkeeping requirements subject to clearance by the Office of Management and Budget.

#### Regulatory Flexibility Act

We certify that these proposed regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities because they primarily affect only disabled individuals who are applying for Title II or Title XVI benefits because of disability.

(Catalog of Federal Domestic Assistance Program No. 13.802, Disability Insurance; No. 13.807)

### List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Death benefits, Disability benefits, Old-Age, Survivors and Disability Insurance

Dated: March 16, 1987.

Dorcas R. Hardy,  
Commissioner of Social Security.

Approved: May 1, 1987.

Otis R. Bowen,  
Secretary of Health and Human Services.

Part 404 of Chapter III of title 20 of the Code of Federal Regulations is amended as follows:

### PART 404—[AMENDED]

1. The authority citation for Subpart P of Part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)-(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 1102 of the Social Security Act; 42 U.S.C. 402, 405(a), (b), and (d)-(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 1302; sec. 505(a) of Pub. L. 96-265, 94 Stat. 473; secs. 2(d)(2), (5), (6),



and (15) of Pub. L. 98-460, 98 Stat. 1797, 1801, 1802, and 1808.

2. Listing 110.00, Multiple Body Systems, of Part B of Appendix 1 (Listing of Impairments) of Subpart P is amended by revising the text of paragraphs A and B, by adding new paragraphs C and D by adding new Listing 110.06 to read as follows:

#### 110.00 Multiple Body Systems

A. *The impairments included in this section usually involve more than a single body system.*

B. *Hereditary disorders and congenital or acquired abnormalities or disease include but are not limited to conditions such as anencephaly, Tay-Sachs, phenylketonuria (PKU), Down syndrome, fetal alcohol syndrome, and severe chronic neonatal infection, as described in 110.06. This listing refers to those life-threatening and other serious hereditary, congenital, or acquired disorders that usually affect two or more body systems and are expected to be incompatible with life and result in early death or produce long-term, if not lifelong, significant interference with age-appropriate major daily or personal care activities. (Significant interference with age-appropriate activities in an infant would be considered to exist where the developmental milestone age did not exceed two-thirds of the chronological age at the time of evaluation and such interference could be expected to last at least 12 months.)*

C. *Documentation must include confirmation of a positive diagnosis by definitive laboratory tests, including chromosomal analysis where appropriate (e.g., Down syndrome), and a clinical description of the condition and the usual associated morphological features. Documentation of immune deficiency disease must be submitted and may include quantitative immunoglobulins, skin tests for delayed hypersensitivity, lymphocyte stimulative tests, and measures of cellular immunity mediators.*

D. *When multiple body system manifestations do not meet one of the established criteria in this section, the combined impairments must be evaluated together to determine if they are equal in severity to a listed impairment.*

\* \* \* \* \*

110.06 *Multiple body dysfunction* due to any confirmed (see 110.00C) hereditary, congenital, or acquired condition with one of the following:

A. *Persistent motor dysfunction as a result of hypotonia and/or musculoskeletal weakness and manifested by significant interference with age-appropriate major daily activities or personal care needs (in an infant such activities as head control, turning, sitting, crawling, walking, taking solids, feeding self); or*

B. *Mental impairment with one of the following:*

1. *Mental retardation as described in 112.05A or B; or*

2. *Resulting in the following:*

a. *IQ not greater than 69; or*  
b. *Developmental milestones of not greater than two-thirds of chronological age; and*

c. *A physical or other mental impairment imposing additional and significant restrictions of function or development; or*

C. *Growth failure as described under the criteria in 100.02A or B; or*

D. *Significant interference with communication due to speech, hearing, or visual defect as described under the criteria in 102.00; or*

E. *Cardiovascular impairments as described under the criteria in 104.00; or*

F. *Other impairments such as, but not limited to, malnutrition, hypothyroidism, or seizures should be evaluated under the criteria in 105.08, 109.02 or 111.02 or the criteria for the affected body system.*

\* \* \* \* \*

[FR Doc. 87-22933 Filed 10-2-87; 8:45 am]

BILLING CODE 4190-11-M

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### Office of the Assistant Secretary for Community Planning and Development

#### 24 CFR Part 570

[Docket No. R-87-1341; FR-2164]

### Community Development Block Grant Program; Escrow Accounts

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** The Department proposes to add a new section titled "Use of escrow accounts for rehabilitation of privately-owned residential property" to Subpart J of the Community Development Block Grant (CDBG) regulations at 24 CFR Part 570. The proposed rule would allow program recipients to use escrow accounts under certain circumstances in connection with CDBG-assisted residential rehabilitation programs.

**DATES:** Comments Due: December 4, 1987.

**ADDRESS:** Interested persons are invited to submit comments to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, 20410

Communications should refer to the above docket number and title. A copy of each communication will be available for public inspection during regular business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Paul D. Webster, Director, financial Management Division, Office of Block Grant Assistance, Room 7180, Department of Housing and Urban Development, 451 Seventh Street, SW.,

Washington, DC 20410, (202) 755-1817. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Except as otherwise specifically indicated in the department's regulations in 24 CFR 570.513 (Lump sum drawdown for property rehabilitation financing), cash withdrawals by letter of credit or electronic funds transfer from the U.S. Treasury by a CDBG program recipient are required to be in accordance with U.S. Department of Treasury regulations on advances under Federal Programs (31 CFR Part 205) and OMB Circular A-102, Attachments G and J. In a recent audit, HUD's Office of Inspector General determined that some CDBG recipients may have violated U.S. Treasury Department regulations by maintaining in escrow accounts for extended time periods unnecessarily large amounts of program funds advanced from the Treasury before a real need existed to use the funds. The HUD Office of Community Planning and Development believes that the currently unregulated use of escrow accounts for residential rehabilitation is widespread among grantees.

This proposed rule is designed to ensure that where CDBG recipients use escrow accounts to fund residential rehabilitation loans and grants, the accounts are established and used in accordance with both the spirit and the letter of the above-mentioned Treasury and OMB requirements. Under these requirements—particularly 31 CFR 205.4—cash withdrawals must be timed to coincide with the actual immediate cash requirements of the recipient in carrying out the approved program or project. The timing of the withdrawals must be as close as is administratively feasible to actual disbursement by the recipient for program costs. Under the letter of these issuances, therefore, when the CDBG-assisted activity takes the form of a loan or grant by the recipient to a private property owner for rehabilitation of property by a private contractor, compliance with the Treasury/OMB cash withdrawal requirements is not to be judged in terms of when the property owner incurs costs under the rehabilitation contract, but when the recipient incurs the program cost for the eligible activity (the loan or grant). In this regard, the program cost is incurred by the recipient at the point that CDBG funds are required to be paid under the terms of the loan or grant agreement between the block grant recipient and the property owner.

Frequently, even typically, these rehabilitation loan or grant agreements



call for payment to the owner by means of the deposit of some or all of the loan or grant proceeds into an escrow account administered by the CDBG recipient or its agent in a private bank, to be disbursed from escrow when both the owner and the recipient are satisfied that work has been properly completed under the rehabilitation contract. Both rehabilitation contractors and property owners are pleased with this arrangement—contractors because they are assured that the money is available for payment upon the satisfactory completion of their work, and owners because they do not have to advance funds to the contractor to get the work underway, or pay a premium to a contractor who can afford to wait for payment for a longer period.

HUD recognizes that administrative convenience and cost savings to the owner, contractor, or CDBG recipient are not really material to the issue of whether Treasury/OMB grant drawdown requirements are being met, and that these requirements demand that there be an immediate cash need for each grant drawdown. Additionally, HUD recognizes that the mere inclusion of a provision regarding drawdown in the terms of a rehabilitation loan or grant contract is not sufficient, in and of itself, to justify the drawdown, since the grantee has the ability to control the terms governing the loan or grant and could use this procedure to circumvent grant drawdown requirements. Nonetheless, the Department is convinced that deposits into escrow accounts or payments to contractors of advances are necessary in many cases in order for owners of small residential properties to procure the services of rehabilitation contractors consistent with HUD or local program objectives (including the provision of opportunities for minority contractors). However, for HUD to make case-by-case determinations of need for an escrow account would be extremely time-consuming. Instead, the Department has developed criteria in this rule both to establish when escrow accounts may be regarded as necessary, consistent with Treasury-OMB guidelines, and to regulate escrow accounts to prevent unnecessary accumulation of funds.

Small, and often minority, contractors constitute a large majority of the firms that participate in CDBG-funded rehabilitation programs, and they are essential to the effective operation of these programs. The rehabilitation industry is, in fact, largely composed of such small contractors. These firms,

generally operated personally by their owners as sole proprietorships, are characterized by a small number of full-time employees and an annual dollar volume of under \$250,000. Generally, these are cash-basis operations working on many individual contracts averaging \$15,000 or less. These firms usually do not have sufficient financial resources to carry receivables for the period of the local government's normal payment cycle. They often are either unable to obtain working capital financing or can do so only at prohibitive rates. These contractors require the timely progress essential to the operation of a CDBG rehabilitation program, particularly for smaller projects involving rehabilitation of primarily residential properties containing no more than four dwelling units, and since small contractors require very prompt payment, the use of escrow accounts in such cases serves a legitimate program need. In addition, it enhances program access by such contractors in accordance with OMB A-102, Attachment O, paragraph 9, which encourages grantor agencies to take "affirmative steps to assure that small and minority businesses are utilized when possible".

Under the proposed rule, a recipient would be permitted initially to withdraw funds from its letter of credit for deposit into an escrow account only after the property owner has executed the contract with the contractor selected to perform rehabilitation work. The terms of the rehabilitation contract between the owner and the contractor must provide expressly for payments through the escrow account. The amount of funds in the escrow account at any time must not exceed the amount the recipient expects to disburse from the account within 10 working days from the date of deposit. If the grantee has, for whatever reason, drawn down more than ten days cash needs, it shall immediately return the excess funds to its program account. In the program account, the excess funds would then be subject to the Treasury's usual rules governing erroneous drawdowns.

The rule would prohibit the use of escrowed amounts for noncontractual eligible costs, such as the recipient's administrative costs under § 570.206 or rehabilitation services under § 570.202(b)(9). The rule also would provide that interest credited to the escrow account, after deducting any service charges, will be remitted to HUD. Upon completion of the rehabilitation activities, unused funds would be required to be withdrawn from

the escrow account and deposited into the recipient's program account, or, in the case of amounts over \$10,000 which will not be disbursed within seven calendar days, remitted to HUD and restored to the recipient's letter of credit. Finally, the rule indicates that where a recipient fails to comply with these limitations, HUD may require the recipient to discontinue the use of escrow accounts, in addition to taking any other corrective and remedial actions that HUD may impose.

**Note**—The references in this preamble to OMB Circular A-102 and its attachments may be changed upon publication of a final rule because the A-102 Common Rule is currently being developed based on a revised circular. Also, references in this preamble and the rule text to other provisions of 24 CFR Part 570 may be changed upon publication of a final rule because of the pending, more comprehensive revision of Part 570 being developed. (Proposed rule published October 31, 1984, 49 FR 43852.)

### Findings

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of Rules Docket Clerk at the above address.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 issued by the President on February 17, 1981. Analysis of the proposed rule indicates that it does not (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs of prices for consumers, individual industries, Federal State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Under the Regulatory Flexibility Act (5 U.S.C. 601), the Undersigned certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule reflects and clarifies existing Federal requirements that govern the disbursement of funds from the U.S. Treasury advanced to recipients in this CDBG program. Accordingly, the rule would not alter contract amounts, or



significantly affect current contracting practices relating to the use of small businesses in performing rehabilitation work.

This rule is listed as item number 1004 in the Department's Semiannual Agenda of Regulations published April 27, 1987 (52 FR 14362) under Executive Order 12291 and the Regulatory Flexibility Act.

The Catalogue of Federal Domestic Assistance number is 14.1218—Community Development Block Grants/Entitlement Grants.

#### List of Subjects in 24 CFR Part 570

Community Development block grants, Grant programs: housing and community development, Loan programs: housing and community development, Low and moderate income housing, New communities, Pockets of poverty, Small cities.

Accordingly, the Department proposes to amend 24 CFR Part 570 as follows:

#### PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

1. The authority citation for 24 CFR Part 570 would continue to read as follows:

**Authority:** Title I, Housing and Community Development Act of 1974 (42 U.S.C. 5301-5320); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. In § 570.511, the heading is revised and text is added to read as follows:

##### § 570.511 Use of escrow accounts for rehabilitation of privately owned residential property.

(a) *Limitations.* A recipient may withdraw funds from its letter of credit for immediate deposit into an escrow account for use in funding loans and grants for the rehabilitation of privately owned residential property under § 570.202(a)(1). The following additional limitations apply to the use of escrow accounts:

(1) The use of escrow accounts under this section is limited to loans and grants for the rehabilitation of primarily residential properties containing no more than four dwelling units (and accessory neighborhood-scale commercial space within the same structure, if any, e.g., a store front below a dwelling unit).

(2) An escrow account shall not be used unless the contract between the property owner and the contractor selected to do the rehabilitation work specifically provides that payment to the contractor shall be made through an escrow account maintained by the recipient or its agent. No deposit to the

escrow account shall be made until after the contract has been executed between the property owner and the rehabilitation contractor.

(3) All funds withdrawn pursuant to this section by a CDBG recipient shall be deposited into one interest earning escrow account with a financial institution. The recipient shall not establish separate bank accounts for individual loans and grants. Interest shall be treated as provided for in paragraph (b) of this section.

(4) The amount of funds deposited into an escrow account shall be limited to the amount expected to be disbursed for all contracts for which the account has been established within 10 working days from the date of deposit. If the escrow account, for whatever reason, at any time contains funds exceeding 10 days immediate cash needs, the grantee immediately shall transfer the excess funds to its program account. In the program account, the excess funds shall be treated as funds erroneously drawn in accordance with the requirements of U.S. Treasury Fiscal Requirements Manual, paragraph 6-2080.30.

(5) Funds deposited into an escrow account shall not be used to pay any eligible costs related to the rehabilitation loan or grant other than actual costs of rehabilitation incurred by the owner under contract with a private contractor. For example, the recipient's administrative costs under § 570.206 or rehabilitation services costs under § 570.202(b)(9) are not permissible uses of escrowed funds, whether or not they may be related to the administration of the rehabilitation activities covered by the contracts.

(b) *Interest.* Interest earned on escrow accounts established in accordance with this section, less any service charges for the account, shall be remitted to HUD at least quarterly but not more frequently than monthly.

(c) *Remedies of noncompliance.* If HUD determines that a recipient has failed to use an escrow account in accordance with this section, HUD may, in addition to imposing any other sanctions provided for under this part, require the recipient to discontinue the use of escrow accounts.

Dated: August 7, 1987.

Jack R. Stokvis,

General Deputy, Assistant Secretary for Community Planning and Development.

[FR Doc. 87-22727 Filed 10-2-87; 8:45 am]

BILLING CODE 4210-29-M

#### DEPARTMENT OF THE INTERIOR

##### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 773

##### Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Notice of reopening of public comment period.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) previously has published a proposed rule which would amend its regulations dealing with the permit approval provisions of the Surface Mining Control and Reclamation Act of 1977. The proposed rule would define the terms "ownership" and "control," and would change the compliance review which regulatory authorities are required to make prior to permit approval. OSMRE is now reopening and extending the comment period for the proposed rule.

**DATE:** The comment period on the proposed rule is reopened and extended until November 4, 1987.

**ADDRESSES:** Written comments may be mailed to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131-L, 1951 Constitution Avenue NW., Washington, DC 20240; or hand-delivered to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131, 1100 L Street NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Andrew F. DeVito, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-5241 (Commercial or FTS).

**SUPPLEMENTARY INFORMATION:** OSMRE previously has published a proposed rule which would amend its regulations dealing with the permit approval process by (1) defining the terms "ownership" and "control" as those concepts are used in the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. 1201 *et seq.*; and (2) amending the scope of the compliance review which regulatory authorities are required to make prior to permit approval. The proposed rule was published in the Federal Register on April 5, 1985 (50 FR 13724).



The comment period for the proposed rule was reopened and extended on April 16, 1986 (51 FR 12879), and again on May 4, 1987 (52 FR 16275). Both of those notices described options being considered for the final rule that would determine the scope of the compliance review that is required to be made prior to permit issuance. OSMRE is now considering another option for the final rule for which further notice and public comment is appropriate.

OSMRE also is drafting guidelines for rebutting the presumptions contained in the options being considered and has received a request to make the current draft of the guidelines available for public comment.

In response to OSMRE's May 4, 1987 notice, a number of interesting and useful comments were received which the agency is considering for the final rule. OSMRE is therefore reopening the public comment period until November 4, 1987, to allow the commenters to see how their suggestions would be reflected in the final draft. Accordingly, OSMRE solicits comments on the option discussed below and on the draft guidelines for rebutting the presumptions contained in the definitions of "owned or controlled" and "owns or controls."

#### List of Subjects in 30 CFR Part 773

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

OSMRE is considering adopting as the final rule the following definitions and compliance review provisions:

#### PART 773—[AMENDED]

1. The authority citation for Part 773 would continue to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, 16 U.S.C. 470 *et seq.*, 16 U.S.C. 1531 *et seq.*, 16 U.S.C. 661 *et seq.*, 16 U.S.C. 703 *et seq.*, 16 U.S.C. 668a *et seq.*, 16 U.S.C. 469 *et seq.*, 16 U.S.C. 470aa *et seq.*

2. Section 773.5 would be added and § 773.15(b)(1) introductory text would be revised to read as follows:

#### § 773.5 Definitions.

*Owned or controlled and owns or controls mean—*

- (a)(1) Being a permittee of a surface coal mining operation;
  - (2) Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity; or
  - (3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.
- (b) The following relationships are

presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

- (1) Being an officer or director of an entity;
- (2) Being the operator of a surface coal mining operation;
- (3) Having the ability to commit the financial or real property assets or working resources of an entity;
- (4) Being a general partner in a partnership; or
- (5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity.

#### § 773.15 Review of permit applications.

(b) \* \* \*

(1) Based on available information concerning Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation orders, delinquent civil penalties issued pursuant to section 518(h) of the Act, bond forfeitures, delinquent abandoned mine reclamation fees, and unabated violations of Federal and State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation, the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or such other law, rule or regulation referred to in this paragraph. In the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued pursuant to § 843.12 of this chapter or under a Federal or State program, except a notice of violation issued for nonpayment of abandoned mine reclamation fees or civil penalties, is being corrected to the satisfaction of the agency with jurisdiction over the violation. If a current violation exists, the regulatory authority shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either—

\* \* \*

The above definitions and compliance review provision will not result in a substantial increase in the amount of information concerning owners and controllers that must be submitted to a regulatory authority by a permit applicant. If the option discussed in this notice is adopted as the final rule, then the information collection requirements

proposed on May 28, 1987 (52 FR 20032) may be substantially reduced when that rule is promulgated.

#### Discussion of Rule Language

##### Definitions

The present option like the May 4, 1987 option contains a definition of the terms "owned or controlled" and "owns or controls" which focuses on those relationships which allow one person or entity to influence or compel compliance with the Act by another person or entity.

Paragraph (a)(1) of the definition expressly includes the permittee as a controller of a surface coal mining operation. This was implicit in the two previous options but never stated.

Paragraph (a)(2) includes ownership of record in excess of 50 percent of an entity. This paragraph would cover direct owners only.

Paragraph (a)(3) includes in the definition any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations. This paragraph would include persons who exercise control over a surface coal mining and reclamation operation even though they may have no official title, or direct authority over a particular entity. "Any relationship" can include one between family members, a lessor and a lessee, an owner of coal and a contract miner, as well as others. Whether such relationships actually give a person authority to determine the manner in which an applicant or an operator, if other than an applicant, conducts surface coal mining operations will be determined on a case-by-case basis. In particular, OSMRE intends to scrutinize the relationships of persons who are linked to violators of the Act and to determine the persons who actually control such violators if any. Under paragraph (a)(3), no limit exists on the examination of corporate structures or the manner in which control may be established.

Paragraph (b) of the definition lists certain relationships which OSMRE will presume to constitute ownership or control unless some person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted. Under paragraph (b)(1) all officers and directors are included in this category. This is different from the May 4, 1987 option which only the chief executive officer, chief operating officer and chairman of the board were



automatically considered to be controllers. OSMRE is proposing to allow officers to rebut the presumption of control because there may be a situation where an officer or chairman of the board does not in fact exercise control.

Paragraph (b)(2) establishes a presumption of control for the operator of a surface coal mining operation. The presumption was included because in some instances, a person other than the operator could possibly be exercising control over the surface coal mining operation.

Paragraph (b)(3) establishes a presumption of control for anyone having the ability to commit the financial or real property assets or working resources of an entity. OSMRE considers such an ability a sufficient indication to imply control.

Paragraph (b)(4) establishes a presumption of control for a general partner in a partnership. OSMRE proposes to establish a presumption of control for general partners because in most instances a general partner is authorized to cause the partnership to act. However, in certain cases, it is possible that an individual partner may not control the partnership.

Paragraph (b)(5) of the definition contains presumptions of control for owners of less than a majority interest. Ownership of record of 10 through 50 percent would result in a presumption of control unless some person can demonstrate that the person to whom the definition applies cannot exercise control. Setting 10 percent as the minimum level for the presumption would be consistent with section 507(b)(4) of the Act which requires permit applicants to submit information on all record owners of greater than 10 percent. The Act does not require regulatory authorities to consider persons owning of record less than 10 percent of the applicant when reviewing the permit application.

The proposed definition reflects the purpose for which the Congress enacted section 510(c). Where an applicant has a current violation, under section 510(c) the regulatory authority cannot approve a permit unless the applicant takes remedial action and then "submits proof that such violation has been corrected or is in the process of being corrected \* \* \*." Thus, by its own terms the purpose of section 510(c) is to prevent the issuance of new permits to parties ultimately responsible for operations currently in violation of the Act or a wide range of other environmental requirements. The proposed definitions would provide an effective inducement

to permit applicants and their owners and controllers to correct violations by including within the permit review persons in a position to have such violations corrected.

In order to speed decisions on permit applications, OSMRE intends to establish guidelines by which OSMRE and State regulatory authorities can make determinations on whether individuals who seek to rebut the presumption of control contained in paragraph (b) have done so adequately. These guidelines will not be a part of the final rule because OSMRE expects them to undergo continual refinement as OSMRE and the State Regulatory authorities gain experience in applying the definitions during the permit approval process.

#### *Section 773.15(b)(1) Compliance Review Provision*

As originally proposed, this option would have required that the regulatory authority make a finding that any surface coal mining operation owned or controlled by either the applicant or by any person who owns or controls the applicant is not currently in violation of the Act or in violation of any Federal law, rule or regulation pertaining to air or water environmental protection. To assist the regulatory authority, proposed § 773.15(b)(1) would include a list of the violations upon which the regulatory authority would base its compliance review. The list includes Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation orders, delinquent civil penalties issued pursuant to section 518(h) of the Act, bond forfeitures, delinquent abandoned mine reclamation fees, and unabated violations of Federal and State laws, rules and regulations pertaining to air or water environmental protection related to surface coal mining operations. The proposed provision would track section 510(c) of the Act by preventing issuance of permits when violations currently exist, but would no longer require a finding by the regulatory authority.

OSMRE is proposing to block issuance of permits on the basis of all bond forfeitures, both interim and permanent program. OSMRE specifically seeks comments on the equity of this proposal, particularly in instances where reclamation of the site on which the bond was forfeited has been completed.

The proposed rule also contains a presumption concerning notices of violations. It states that in the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation, except for a notice of

violation issued for nonpayment of abandoned mine reclamation fees or civil penalties, is being corrected to the satisfaction of the agency with jurisdiction over the violation. The intent of this provision is to provide a more accurate description of the stage at which a violation is considered unabated when performing the review required by section 510(c), while still requiring that money owed the government is paid in a timely fashion.

Until such time as OSMRE adopts final definitions for "ownership" and "control" and revises 30 CFR 773.15(b)(1), OSMRE will continue to process permit applications according to the requirements set out in paragraphs 1 through 3 of the Court Order issued in the case of *Save Our Cumberland Mountains, Inc., et al v. Clark*, Civil Action No. 81-2134 (D.D.C. 1985). Those are the criteria OSMRE has been following since the Court Order was issued on January 31, 1985.

#### **Guidelines for Rebutting Presumptions**

Under the proposed definition of "owned or controlled" and "owns or controls," certain relationships would be presumed to constitute ownership or control. To rebut the presumptions, a person in such a relationship would have to submit to the regulatory authority clear and convincing evidence to the contrary. While the content and form of this evidence would depend on the particular circumstances in each case, OSMRE is considering the adoption of advisory guidelines for use by regulatory authorities and affected persons on the type of evidence that in most instances would be sufficient to rebut the presumptions.

The draft guidelines OSMRE currently is considering specify the following circumstances as evidence to rebut the presumption:

(a) The corporate charter, bylaws, articles of incorporation, or other legal instrumentalities establishing the mechanisms or processes by which the entity carries out its business, specifically prohibits by name or title the individual from compelling action to abate the violation or pay penalties or other financial assessments remaining unpaid and no evidence exists to the contrary.

(b) That the ability of the individual seeking to rebut control is legally prohibited from undertaking any or all of the actions indicated above and in fact cannot do so.

(c) Based on other evidence, the individual cannot, or could not at the



time the violation occurred, cause the entity to perform the actions mentioned above.

To document this evidence, the draft guidelines provide that the individual seeking to rebut the presumption should submit to the regulatory authority the following information:

(1) Copies of the charter, bylaws, articles of incorporation or other legal instruments which clearly establish that the individual is not a controller of the entity. Specific citations and reference should be made and a legal opinion of the corporation counsel or legal advisor attesting to the legal sufficiency of the claim of non-control should accompany the documentation.

(2) If non-control is being attributed to a legal prohibition, copies of the statute or statutes cited together with a copy of a legal opinion from the corporation counsel or other legal advisor attesting to the legal sufficiency of the statute or statutes for establishing a position of non-control.

(3) Affidavits or notarized personal statements describing actions taken by the individual or group of individuals seeking to rebut the presumption of control which clearly indicate what action the individual has taken to compel the entity to correct the violation or pay the debt owed. The affidavit or personal statement should be specific as to times, places and actions taken.

As these guidelines are only at a draft stage, OSMRE solicits comments on alternative or additional guidelines that might be adopted for rebutting the presumptions established by the definition. For example, the assets of a corporate parent and its subsidiary may be relevant in determining whether a parent or its officers lacks control of the subsidiary. Or publicly held entities might be evaluated differently from those which are privately held.

As noted previously, the guidelines will be advisory only. They will not be adopted as regulations or otherwise be included in the final rule. OSMRE has decided on this approach to give regulatory authorities adequate discretion to evaluate the presumptions in each case in a way that best will achieve the purposes of the Act.

Date: October 1, 1987.

Jed D. Christensen,

Director, Office of Surface Mining  
Reclamation and Enforcement.

[FR Doc. 87-23039 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-05-M

## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 202

[Docket No. RM85-4A]

### Registration of Claims to Copyright; Registration and Deposit of Databases Proposed Regulations

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Proposed regulations.

**SUMMARY:** The Copyright Office of the Library of Congress issues this notice to advise the public that it is considering adopting a new regulation that would permit group registration of an automated database, including revisions and updates, 37 CFR 202.3(b)(4), and would make changes in existing regulations for the registration and deposit of databases. The proposed amendments would implement a portion of section 408 of the Copyright Act of 1976, title 17 of the U.S. Code. This section embodies the deposit requirements for copyright registration. These amendments would not only formalize the procedure now being used by the Copyright Office for the deposit and registration of databases but would also permit the group registration of a single database and revisions and updates of the database, even though published at different times.

**DATES:** All comments should be received on or before December 4, 1987.

**ADDRESSES:** Ten copies of written comments should be addressed, if sent by mail, to: Library of Congress, Department 100, Washington, DC 20540.

If delivered by hand, copies should be brought to: Office of General Counsel, James Madison Memorial Building, Room 407, First and Independence Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, DC 20559, (202) 287-8380.

**SUPPLEMENTARY INFORMATION:** Under the Copyright Act of 1976, Title 17, U.S. Code, copyright may ordinarily subsist in an automated database either as an original compilation or as some other original work of authorship. Databases provide special problems for copyright deposit and examination, however, because many of them are constantly changing or the updates may consist of small increments of information. To the extent the basic database and the updates are copyrightable, questions arise as to how best to register the claims.

Under current practice, the Office essentially allows the claimant to determine how frequently to register updates of a database, but does not allow grouping of separately published updates on a single registration. Special relief provisions already provide some flexibility in deposit requirements. See H.R. Rep. 94-1476, 94th Cong., 2d Sess. 151 (1976). The specific provision relating to the registration of machine-readable databases is found in 37 CFR 202.20(c)(2)(vii)(B), while the special relief provision is § 202.20(d).

Pursuant to 17 U.S.C. 103, "copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material."

The Copyright Act of 1976 encourages registration by conferring special benefits on the registrant. Registration is a prerequisite to suit, 17 U.S.C. 411(a); if the registration is made before publication or within five years of first publication, the certificate of registration is *prima facie* evidence of the facts it states and of the validity of the copyright, 17 U.S.C. 410(c); and by registering the work within three months of the publication, the copyright owner preserves the right to claim statutory damages and discretionary counsel fees. 17 U.S.C. 412.

Section 408 of the statute requires deposit of material in connection with applications for copyright registration of unpublished and published works. Subsection 408(c)(1) authorizes the Register of Copyrights to specify classes into which works may be placed for purposes of deposit and registration. One of the alternatives is "a single registration for a group of related works."

When the Copyright Office issued its 1978 deposit regulations, several comments requested special provisions for group registration of revisions and updates of automated databases. 43 FR 763 (January 4, 1978). At that time the Office invited further comments and suggestions as to the type of related works that could be covered by group registration and the deposit and registration requirements applicable in those cases. The possibility of providing for "a single registration for a group of related works," however, was "reserved for implementation in a separate proceeding," if any. 43 FR 965 (January 5, 1978). Whether to allow any group registrations is discretionary with the Copyright Office except in the case of certain published contributions to



periodicals, 17 U.S.C. 408(c), and the Office has elected not to exercise this discretionary authority to date.

On February 14, 1985 (50 FR 6208), the Copyright Office requested public comment on proposed amendments to the regulations governing deposit. In their response to this request, the Association of American Publishers (AAP) and the Information Industry Association (IIA) commented specifically on the deposit and registration of databases. AAP stated that the Copyright Office should develop regulations to meet the problems of deposit for dynamic databases subject to regular revision, expansion, or other change. AAP proposed regulations that would permit a single "group" registration for varying versions (enhancements, updates, and other modifications) of a database, and related databases, published within a twelve-month period, or any lesser period within twelve months, on the basis of a single deposit and application. AAP also urged that deposit material reflect reasonable portions of output, rather than "raw data" or the like, and that the Office should relax deposit requirements in the case of successively ("group") registered revisions.

IIA also proposed the addition of a new regulation that would permit group registration of databases if certain conditions are met. The group registration would require that works have the same copyright claimant, the same general title, and similar general content, including subject and organization. If the works are published, each must bear a separate copyright notice as first published and have the same copyright owner, and the work or works must be first published within three months prior to registration.

IIA suggested that the deposit for databases cannot serve as documentation of the complete identity of the work's content, either to show the extent of registration or the entirety of the work. IIA recommended that relevant evidence in the examination of authorship would be documentary evidence of the continuing process of creation, hard copy extracts (for example, the first and last 25 pages), and the same direct online access as is offered the customer.

IIA also advocated the use of special relief that would allow the Register of Copyrights to "permit the deposit of identifying material which does not comply with § 202.21 of these regulations."

On June 10, 1985 (50 FR 24240), the Copyright Office published a Notice of Inquiry inviting public comment on the deposit requirements for machine-

readable databases including revisions and derivative works based upon previously registered databases.

In response to this Notice of Inquiry, seven commentators submitted letters to the Copyright Office. Having reviewed both the original proposals and the comments, the Copyright Office has decided to propose group registration of certain databases and their updates. It invites comments on the details of the registration and deposit proposals.

### 1. Group Registration for Automated Databases

As noted in the original IIA proposal, 17 U.S.C. 408(c)(1) authorizes the Register of Copyrights "to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration \* \* \*. The regulations may require or permit \* \* \* a single registration for a group of related works." Five of the commentators supported the group registration of databases; three emphasized the burden of registering under the present regulations, which require multiple registrations for dynamic databases. One commentator noted the virtual impossibility of registering their daily updates under the present regulations. The attorney for the Online Computer Library Center (OCLC) emphasized the uncertainty of what is covered in the OCLC registrations, which are currently made on a monthly basis.

Three responses addressed what the minimum frequency period should be for the registration of group works. Initially IIA had supported a three month period on the grounds that it would "(1) spur claimants to register as soon as possible, so as to retain all of the remedies provided by the statute and (2) avoid unnecessary confusion, because three months is a period already of significance under the Act as the grace period under Section 412(2) for preserving all remedies for published works." AAP maintained its earlier position that called for a twelve-month registration period but noted that those who wished to register at three-month intervals should be permitted to do so. Dunn and Bradstreet also endorsed the twelve-month registration period.

On the basis of the comments received and its own analysis of the issues, the Copyright Office has concluded that it should permit a single group registration for varying updates of a database over a three month period of time. This group registration would be limited to a single automated database and its updates. The Copyright Office finds that sufficient factors such as size, complexity and technological

characteristics, exist to distinguish the automated database from other groups of related works and that these factors justify group registration for automated databases under a certain set of facts, at least on an experimental basis. The Office has selected the three month registration period to encourage earlier registration, to be consistent with other statutory provisions in the nature of a grace period, and to keep the scope of the registration within manageable proportions for purposes of judicial review. Of course, claimants may elect to apply for group registration of databases more frequently than at three-month intervals. However, if claimants seek registration of updates covering more than a three-month period, then they cannot avail themselves of the group registration option, although they could register as a single work a particular version of a database on a given day.

The Copyright Office remains concerned about the administrative costs of processing and examining related works for a single fee. It will monitor the experience with database registrations under any final regulations and revisit the issue as necessary. Because of the serious concerns about processing costs and administrative burdens in the case of group registrations, the Office will apply the database regulation narrowly and will not now apply its discretionary authority to other related works.

The Office does not propose a special fee for group registration of a database and its updates. The normal \$10 application filing fee applies.

### 2. Deposit Based on Reasonable Portions of Output

Under current regulations governing registration for a single-file database, applicants deposit "one copy of identifying portions of the work reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform." In practice, "identifying portions" is equivalent to the first and last 25 pages.

Deposit for a multi-file database calls for representative portions of each file—50 data records or the entire file, whichever is less, plus a descriptive statement containing: The title of the database; the name and address of the copyright claimant; the name and content of each separate file within the database, including subject matter, origin of data and number of separate records within each file; for published databases, a description of the exact contents of any machine-readable



copyright notice used in or with the database (plus manner and frequency of display) and a sample of any visually perceptible copyright notice affixed to the copies or container. In the case of registration for revisions of a previously registered database, the required representative portions shall reflect the copyrightable changes.

The commentators urged that the Office not require the database deposit to serve as documentation of the complete identity of the work's content, either to show the extent of registration or the entirety of the work. Three commentators agreed with the IIA position that the focus of the deposit requirements should be on a deposit that would enable the Copyright Office to determine copyrightability. They agreed that a simplified deposit of identifying portions, e.g., the first and last 25 pages of a printout, should be sufficient.

The commentators did not agree, however, whether the deposit of identifying portions should disclose the raw data itself, or should reflect the "output" of the database.

With respect to updates, three commentators urged that the deposit should consist of a "descriptive statement" which incorporates by reference the material representations made to the Office at the time of the original registration. Then these commentators suggested that subsequent deposits should consist of new identifying material or a statement that the prior material is still representative of the database.

The Copyright Office has concluded, however, that the existing requirements for single, multi-file, and revised databases should not be reduced in the case of group registration of databases. The Office finds that, in order to determine copyrightability and develop an adequate administrative record for judicial review, it needs as much deposit material for the group registration of a database and its updates as it now receives for individual registration of databases. In summary these deposit materials are: (1) For a single-file database, one copy of identifying portions of the work reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform; (2) for a multiple-file database or revised database, representative portions showing copyrightable content, accompanied by the requisite descriptive statement.

The Office therefore proposes to establish essentially a uniform set of deposit requirements, whether database registration is sought on a group basis, pursuant to the proposed new regulations, or is sought only for a given

day's version of the database. The Office proposes to maintain the existing regulations, recast in form and modified as follows:

(1) For a revised database, the deposit material would be marked to show representative copyrightable changes and the descriptive statement would show the location generally of the remaining copyrightable changes, not disclosed in the deposit;

(2) For group registrations, the claimant would select a representative creation or publication date, depending on whether the work is unpublished or published, and deposit accordingly.

Current practice permits registration of encoded databases without a key or explanation of the code under the rule of doubt upon receipt of the copyright owner's written confirmation that the work as deposited represents copyrightable authorship. This practice will be maintained.

If an applicant is unable or unwilling to meet the deposit requirements because if trade secrets contained in the work, the applicant can request special relief from these requirements.

Those who responded to the Notice of Inquiry did not address the special relief issue. In its original proposal of March 29, 1985, IIA supported adding an amendment to § 202.20 stating that the Register may "permit the deposit of identifying material which does not comply with § 202.21 of these regulations."

Section 202.21 establishes the general requirements for the deposit of identifying material instead of copies. In 1986, the special relief provision, § 202.20(d), was amended to allow waiver of the identifying material standards. 51 FR 6402. The special relief regulation provides sufficient recourse or those who are unable or unwilling to meet the deposit requirements. The Copyright Office will continue to consider special relief for databases that cannot meet the ordinary deposit requirements.

### 3. Copyrightability of Database Updates

For the typical automated database, consisting of a large volume of information or data, the Copyright Office can generally determine without much difficulty that the initial form or version of the database is a copyrightable work of original authorship. The determination that subsequent updates are also original works of authorship cannot be so readily made. Several different types of databases exist. Updates vary in content, nature, and frequency. In *Financial Information, Inc. v. Moody's Investor Service, Inc.*, 751 F.2d 501 (2d

Cir 1984), 808 F.2d 204 (2d Cir. 1986), the Second Circuit held that the daily updates of bond rating information were not copyrightable.

In proposing group registration of automated databases and their copyrightable updates, the Copyright Office recognizes that it cannot determine by examination that each update in the group of updates registered at three months intervals is copyrightable at every point in time when information is added to the basic database. The Office seeks, however, to assure that representative portions of the changing database are deposited which disclose adequately the copyrightable content of the changes. The Office also provides in this proposal that the updates occurring within the three month period should be submitted for group registration only if they are individually copyrightable, that is, if each daily or less frequent update meets the statutory standard of original work of authorship.

Undoubtedly, this first administrative regulation of group registration is experimental. The Office will continue to monitor the emerging decisional law with respect to automated databases, will evaluate the administrative experience under any final regulation, and will reconsider the proper scope of, and conditions for, group registration of databases as appropriate.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (Title 5, Chapter 5 of the U.S. Code, Subchapter II and Chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.<sup>1</sup>

<sup>1</sup> The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17], except with respect to the making of copies of copyright deposits). [17 U.S.C. 706(b)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.



### List of Subjects in 37 CFR Part 202

Registration of claims to copyright, Claims to copyright, Copyright registration.

### Proposed Regulations

In consideration of the foregoing, the Copyright Office proposes to amend Part 202 of 37 CFR, Chapter II.

### PART 202—[AMENDED]

1. The authority citation for Part 202 would continue to read as follows:

Authority: Sec. 702, 90 Stat. 2541, 17 U.S.C. 702; §§ 202.19, 202.20 and 202.21 are also issued under 17 U.S.C. 407 and 408.

2. Section 202.3(b)(4) would be revised to read as follows:

#### § 202.3 [Amended]

\* \* \*

(b) \* \* \*

(4) Group registration of automated databases.

(i) Pursuant to the authority granted by section 408(c)(1) of Title 17 of the United States Code, the Register of Copyrights has determined that a single registration, on the basis of a single application, deposit, and registration fee, may be made for automated databases and their updated, copyrightable versions if all of the following conditions are met:

(A) In cases where a database (or updates thereof), if unpublished, are fixed, or if published are published only in the form of machine-readable copies:

(1) All of the updates are owned by the same copyright claimant;

(2) All of the updates have the same collective title;

(3) All of the updates are similar in their general content, including their subject;

(4) All of the updates are similar in their organization;

(5) Each of the updates, if published, bore a separate copyright notice as first published and the name of the owner of copyright in each work (or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner) was the same in each notice;

(6) Each of the updates, if published, was first published within a three-month period;

(7) Each of the updates, if unpublished, was created within a three-month period;

(8) The deposit accompanying the application complies with § 202.20(c)(2)(vii)(B).

(B) [Reserved for works other than automated databases].

(ii) Registration may be made for both a database published on a single date

and for subsequent copyrightable updates of the earlier material, including added, incremental updates. An application for group registration of automated databases under section 408(c)(1) of Title 17 and this subsection shall consist of:

(A) A basic initial application for registration of an automated database on Form TX, which shall contain the information required by the form and its accompanying instructions;

(B) In the case of updates of a previously registered automated database, an adjunct form prescribed by the Copyright Office and designated "Adjunct Application for Registration of Updates of Automated Databases" (Form GR/DB), which shall contain the information required by the form and its accompanying instructions and shall comply with all the conditions of this subsection;

(C) A filing fee of \$10; and

(D) The deposit required by

§ 202.20(c)(2)(vii)(B).

3. Section 202.20(c)(2)(vii)(B) would be revised to read as follows:

#### § 202.20 [Amended]

\* \* \*

(c) *Nature of required deposit.*

(1) \* \* \*

(2) \* \* \*

(vii) \* \* \*

(B) For published and unpublished automated databases, compilations, statistical compendia, and other literary works so fixed or published, one copy of identifying portions of the work, reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform. For these purposes:

(1) "Identifying portions" shall generally mean either the first and last 25 pages or equivalent units of the work if reproduced on paper or in microform.

(2) "Data file" and "file" shall mean a group of data records pertaining to a common subject matter regardless of their size or the number of data items in them.

(3) If the work is an automated database comprising separate or distinct data files, "identifying portions" shall instead consist of 50 complete data records from each data file or the entire data file, whichever is less, and the descriptive statement required by paragraph (c)(2)(vii)(B)(4).

(4) In the case of a revised or updated version of a database, the claimant shall deposit identifying portions that contain 50 representative pages or equivalent units, or representative data records, which have been marked to disclose the copyrightable revisions added on at least one representative publication

date if published or one representative creation date, if unpublished, and shall also deposit a brief typed or printed descriptive statement containing the notice of copyright information required under "(5)" or "(6)" immediately below and:

(i) The title of the database;

(ii) A subtitle, date of creation or publication, or other information, to distinguish any separate or distinct data files for cataloging purposes;

(iii) The name and address of the copyright claimant;

(iv) For each separate file, its name and content, including its subject, the origin(s) of the data, and the approximate number of data records it contains; and

(v) In the case of a revised or updated version of an automated database, information as to the nature and frequency of changes in the database and some identification of the location within the database or the separate data files of the copyrightable changes.

(5) For a copyright notice embodied in machine-readable form, the statement shall describe exactly the visually perceptible content of the notice which appears in or with the database, and the manner and frequency with which it is displayed (e.g., at user's terminal only at sign-on, or continuously on terminal display, or on printouts, etc.).

(6) If a visually perceptible copyright notice is placed on any copies of the work (or on magnetic tape reels or containers therefor), a sample of such notice must also accompany the statement.

\* \* \*

Dated: September 17, 1987.

Ralph Oman,  
Register of Copyrights.

Approved by:  
James H. Billington,  
The Librarian of Congress.  
[FR Doc. 87-22958 Filed 10-2-87; 8:45 am]

BILLING CODE 1410-07-M

### VETERANS ADMINISTRATION

#### 38 CFR Part 3

#### Improvements in Veterans' Benefits

AGENCY: Veterans Administration.

ACTION: Proposed regulations.

**SUMMARY:** The Veterans Administration (VA) is proposing to amend its adjudication regulations to improve and extend eligibility for certain veterans' benefits. These amendments are necessary because the Veterans'



Benefits Improvement and Health-Care Authorization Act of 1986 changed the eligibility and entitlement criteria for those benefits. The effect of these amendments will be the addition of new presumptively service-connected disabilities for former prisoners of war, improvement in compensation payable for certain multiple disabilities, exclusion of certain income in computing pension entitlement, extension of eligibility for special home adaptation grants and a change in the effective date of reduction for certain hospitalized incompetent veterans. Additional amendments are also proposed to implement opinions of the VA General Counsel and a settlement agreement.

**DATES:** Comments must be received on or before November 4, 1987. Comments will be available for public inspection until November 18, 1987. It is proposed to make these amendments effective October 28, 1986, with the exception of the amendments to 38 CFR 3.309(c) which are proposed to be effective October 1, 1986, as provided by law, and the amendments to 38 CFR 3.22, 3.23, 3.271, 3.272 (h) and (m), and 3.557(c) and 3.800 which are proposed to be effective 30 days after publication of the final rule.

**ADDRESSES:** Interested persons are invited to submit written comments, suggestions, or objections regarding these regulations to Administrator of Veterans Affairs (271A), Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420. All written comments received will be available for public inspection only in the Veterans Service Unit, Room 132 at the above address, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays), until November 18, 1987.

**FOR FURTHER INFORMATION CONTACT:** Robert M. White, chief, Regulations Staff, Compensation and Pension Service, Department of Veterans Benefits, (202) 233-3005.

**SUPPLEMENTARY INFORMATION:** The Veterans' Benefits Improvement and Health-Care Authorization Act of 1986 (Pub. L. 99-576) made several changes in eligibility and entitlement criteria for certain veterans' benefits. The changes made by the law are set forth below, together with the proposed regulatory amendments implementing those changes.

Section 108 of the law added two disabilities to the list of conditions in 38 U.S.C. 312(b) presumed to be service-connected for former prisoners of war in the absence of affirmative evidence of some other post-service cause. Those

disabilities are post-traumatic osteoarthritis and organic residuals of frostbite. The latter disability may be service-connected only if it is determined that the veteran was interned in climatic conditions consistent with the occurrence of frostbite. We propose to add these two disabilities to the list of presumptively service-connected diseases for former prisoners of war contained in 38 CFR 3.309(c).

Section 109 of the law amended 38 U.S.C. 360 to provide for special consideration in certain cases of loss of paired organs or extremities. This change authorizes the payment of compensation for five specific combinations of service-connected and nonservice-connected disabilities in the same manner as if both disabilities were service-connected, as long as the nonservice-connected disability was not the result of the veteran's own willful misconduct. The disability combinations are (1) service-connected blindness of one eye and nonservice-connected blindness of the other eye; (2) service-connected loss or loss of use of one kidney and nonservice-connected involvement of the other kidney; (3) service-connected total deafness in one ear and nonservice-connected total deafness in the other ear; (4) service-connected loss or loss of use of one hand or foot and nonservice-connected loss or loss of use of the other hand or foot; and, (5) permanent service-connected disability of one lung, rated 50 percent or more disabling, in combination with a nonservice-connected disability of the other lung. The fourth disability combination noted above previously afforded entitlement to special monthly compensation under 38 U.S.C. 314(t) which has been repealed.

Section 109 also amended 38 U.S.C. 360 to include an offset provision whereby an award of money or property of value pursuant to a judicial proceeding based on, or a settlement or compromise of, any cause of action for damages for the entitling nonservice-connected disability would be recovered through withholding of compensation. A similar offset provision was in effect for entitlement under 38 U.S.C. 314(t) and is being continued with respect to the fourth disability combination under 38 U.S.C. 360. For the remaining disability combinations the offset provisions apply only with respect to awards of compensation made on or after October 28, 1986.

We propose to implement the provisions of section 109 of the law by appropriately amending 38 CFR 3.383 to incorporate the new entitlement criteria and offset provisions. We are also

adding, as we have with other offset provisions, separate paragraphs providing an exemption from offset for social security and workers' compensation, and an affirmative duty for veterans to report the receipt of money or property resulting from judgments, settlements or compromises involving the entitling nonservice-connected disabilities. We also propose to delete 38 CFR 3.384 because the statutory authority for that section has been repealed, and veterans entitled under that section will now be entitled under § 3.383.

In an opinion on a related matter, the VA General Counsel has held that the offset provisions applicable to compensation awards under 38 U.S.C. 351 do not apply to any portion of such benefits that represent payment for periods prior to the month following the date on which a separate judgment, settlement or compromise became final. Since the offset provisions of 38 U.S.C. 351 are similar to those under 38 U.S.C. 360 (as amended) and 410(b), we propose to amend 38 CFR 3.22, 3.383 and 3.800 to include clarifying language that retroactive benefits for periods prior to the month following the date of receipt of money or property pursuant to an applicable judgment, settlement or compromise are not subject to offset.

Section 205 of the law amended 38 U.S.C. 618 to recharacterize monies received as a result of participation in a therapeutic or rehabilitation activity as a distribution of funds rather than as payment or remuneration. Section 205 also excluded such distributions of funds from inclusion as income in determining pension entitlement. To implement these changes we propose to amend 38 CFR 3.342(b)(4)(ii) and 3.343(c) to incorporate the recharacterization of monies received, and we propose to provide for the income exclusion by adding a new paragraph (1) to 38 CFR 3.272.

Section 401 of the law amended 38 U.S.C. 801(b)(1) to provide eligibility for special home adaptation grants to assist certain severely disabled veterans in acquiring residences that were already adapted with special features determined to be necessary because of disability. These grants were previously available only for adding special features to a previously unadapted residence. We propose to implement this extension of eligibility by amending 38 CFR 3.809a.

Section 503 of the law amended 38 U.S.C. 3012 to provide a new effective date for discontinuance of benefits to certain incompetent veterans. Under 38 U.S.C. 3203, benefits must be



discontinued when an institutionalized incompetent veteran, without dependents, has an estate which equals or exceeds \$1,500. The new law establishes the effective date of such discontinuance as the last day of the month of admission or the last day of the month in which the veteran's estate equals or exceeds \$1,500, whichever is later. To implement this change we propose to amend 38 CFR 3.557(d) and 3.501(i).

We are also proposing to amend 38 CFR 3.557(c) to indicate that the value of an incompetent veteran's estate will be computed under the provisions of 38 CFR 13.109. This change will place all of the factors to be considered in estate computation into one regulation for ease of administration.

As part of a stipulation for dismissal in the case of *United States v. Harriet Hawk*, the VA agreed to initiate rulemaking procedures to define the term "hardship" as used in 38 U.S.C. 541(g). That section of law provides for exclusion of a child's available income in determining a surviving spouse's pension entitlement if the inclusion of the income would work a hardship on the surviving spouse. A similar exclusion is available under 38 U.S.C. 521(h) in determining pension entitlement for a disabled veteran.

To implement this agreement we propose to amend 38 CFR 3.23(d) to define the term "hardship" as existing when annual expenses for reasonable family maintenance exceed the sum of countable annual income plus VA pension entitlement. Guidance is also provided with respect to the terms "expenses for reasonable family maintenance" and "reasonable availability" of a child's income. We also propose to amend 38 CFR 3.272 by adding a new paragraph (m) to provide for exclusion from a child's available income an amount sufficient to meet that hardship.

In another opinion the VA General Counsel has held that where a surviving spouse's claim for death pension is received more than 45 days after the date of the veteran's death, thus limiting the effective date of an award to date of claim, expenses of the veteran's last illness, burial and just debts which were paid by the surviving spouse after the date of death but before the date of entitlement are not deductible from the surviving spouse's annual income for pension purposes. We propose to implement this opinion by amending § 3.272(h) to state that expenses paid during such period are not deductible in computing pension entitlement. We are also taking this opportunity to revise the language of that section and also § 3.271

to substitute the term "12-month annualization period" for the term "calendar year" since income determinations for improved pension are not on a calendar year basis.

In reviewing § 3.272 for the above opinion, the VA General Counsel also noted that paragraph (h)(1)(i) incorrectly, and in excess of statutory authority, provided that the expenses of a veteran's last illness which were paid by a veteran's child prior to the death of the veteran could be deducted from the income of the child for death pension purposes. Under 38 U.S.C. 503(a)(3) that deduction is available only for a surviving spouse. Accordingly, we propose to amend § 3.272(h)(1)(i) to delete the words "or child" each place they appear.

#### Executive Order 12291

In accordance with Executive Order 12291, Federal Regulation, we have determined that these regulatory amendments are nonmajor for the following reasons:

(1) They will not have an annual effect on the economy of \$100 million or more.

(2) They will not cause a major increase in costs or prices.

(3) They will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### Regulatory Flexibility Act (RFA)

The Administrator hereby certifies that these regulatory amendments will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601 through 612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans, Veterans Administration.

(Catalog of Federal Domestic Assistance program numbers are 64.100 through 64.110)

Approved: September 2, 1987.

Thomas K. Turnage,  
Administrator.

38 CFR Part 3, ADJUDICATION, is proposed to be amended as follows:

#### PART 3—[AMENDED]

1. In § 3.22 paragraph (b) is revised by adding a sentence and an authority citation at the end to read as follows:

**§ 3.22 Benefits at DIC rates in certain cases when death is not service-connected.**

(b) \* \* \* The provisions of this paragraph do not apply, however, to any portion of such benefits payable for any period preceding the end of the month in which such money or property of value is received.

(Authority: 38 U.S.C. 210(c))

2. In § 3.23, new paragraph (d)(6) is added to read as follows:

**§ 3.23 Improved pension rates—Veterans and surviving spouses.**

(d) \* \* \*

(6) *Reasonable availability and hardship.* For the purposes of paragraphs (d)(4) and (d)(5) of this section, a child's income shall be considered "reasonably available" when it can be readily applied to meet the veteran's or surviving spouse's expenses necessary for reasonable family maintenance, and "hardship" shall be held to exist when annual expenses necessary for reasonable family maintenance exceed the sum of countable annual income plus VA pension entitlement. "Expenses necessary for reasonable family maintenance" include expenses for basic necessities (such as food, clothing, shelter, etc.) and other expenses, determined on a case-by-case basis, which are necessary to support a reasonable quality of life.

(Authority: 38 U.S.C. 210(c))

3. In § 3.271, paragraphs (a), (e) and (f) are revised to read as follows:

**§ 3.271 Computation of income.**

(a) *General.* Payments of any kind from any source shall be counted as income during the 12-month annualization period in which received unless specifically excluded under § 3.272.

(Authority: 38 U.S.C. 210(c))

(e) *Installments.* Income shall be determined by the total amount received



or anticipated during a 12-month annualization period.

(Authority: 38 U.S.C. 210(c))

(f) *Deferred determinations.* When an individual is unable to predict with certainty the amount of countable annual income, the annual rate of improved pension shall be reduced by the greatest amount of anticipated countable income until the end of the 12-month annualization period, when total income received during that period will be determined and adjustments in pension payable made accordingly.

(Authority: 38 U.S.C. 210(c))

4. In § 3.272 the introductory text, paragraphs (g) introductory text, (g)(1)(iii), (g)(2)(iii), (g)(3), (h) introductory text, and (h)(1)(i) are revised, and paragraphs (l) and (m) are added to read as follows:

#### § 3.272 Exclusions from income.

The following shall be excluded from countable income for the purpose of determining entitlement to improved pension. Unless otherwise provided, expenses deductible under this section are deductible only during the 12-month annualization period in which they were paid.

(Authority: 38 U.S.C. 210(c))

(g) *Medical expenses.* Within the provisions of the following paragraphs, there will be excluded from the amount of an individual's annual income any unreimbursed amounts which have been paid within the 12-month annualization period for medical expenses regardless of when the indebtedness was incurred. An estimate based on a clear and reasonable expectation that unusual medical expenditure will be realized may be accepted for the purpose of authorizing prospective payments of benefits subject to necessary adjustment in the award upon receipt of an amended estimate, or after the end of the 12-month annualization period upon receipt of an eligibility verification report.

(Authority: 38 U.S.C. 210(c))

(1) \* \* \*

(iii) They were or will be in excess of 5 percent of the applicable maximum annual pension rate or rates for the veteran (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound) as in effect during the 12-month annualization period in which the medical expenses were paid.

(2) \* \* \*

(iii) They were or will be in excess of the applicable maximum annual pension

rate or rates for the spouse (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound) as in effect during the 12-month annualization period in which the medical expenses were paid.

(Authority: 38 U.S.C. 210(c))

(3) *Children's income.* Unreimbursed amounts paid by a child for medical expenses of self, parent, brothers and sisters, to the extent that such amounts exceed 5 percent of the maximum annual pension rate or rates payable to the child during the 12-month annualization period in which the medical expenses were paid.

(Authority: 38 U.S.C. 210(c))

(h) *Expenses of last illnesses, burials and just debts.* Expenses specified in paragraphs (h)(1) and (h)(2) of this section which are paid during the calendar year following that in which death occurred may be deducted from annual income for the 12-month annualization period in which they were paid or from annual income for any 12-month annualization period which begins during the calendar year of death, whichever is to the claimant's advantage. Otherwise, such expenses are deductible only for the 12-month annualization period in which they were paid. Any such expenses paid subsequent to death but prior to date of entitlement are not deductible.

(Authority: 38 U.S.C. 210(c))

(1) \* \* \*

(i) Amounts paid by a spouse before a veteran's death for expenses of the veteran's last illness will be deducted from the income of the surviving spouse.

(Authority: 38 U.S.C. 503(a)(3))

(l) *Distributions of funds under 38 U.S.C. 618.* Distributions from the Veterans Administration Special Therapeutic and Rehabilitation Activities Fund as a result of participation in a therapeutic or rehabilitation activity under 38 U.S.C. 618 shall be considered donations from a public or private relief or welfare organization and shall not be countable as income for pension purposes.

(Authority: 38 U.S.C. 618(f))

(m) *Hardship exclusion of child's available income.* When hardship is established under the provisions of § 3.23(d)(6) of this part, there shall be excluded from the available income of any child or children an amount equal to the amount by which annual expenses necessary for reasonable family maintenance exceed the sum of countable annual income plus VA

pension entitlement computed without consideration of this exclusion. The amount of this exclusion shall not exceed the available income of any child or children, and annual expenses necessary for reasonable family maintenance shall not include any expenses which were considered in determining the available income of the child or children or the countable annual income of the veteran or surviving spouse.

(Authority: 38 U.S.C. 521(h), 541(g))

5. In § 3.309, the list in paragraph (c) and the authority citation for the section is revised to read as follows:

#### § 3.309 Disease subject to presumptive service connection.

\* \* \* \* \*

(c) *Diseases specific as to former prisoners of war.*

\* \* \* \* \*

Avitaminosis  
Beriberi (including beriberi heart disease)  
Chronic dysentery  
Helminthiasis  
Malnutrition (including optic atrophy associated with malnutrition)  
Pellagra  
Any other nutritional deficiency  
Psychosis  
Any of the anxiety states  
Dysthmic disorder (or depressive neurosis)  
Organic residuals of frostbite, if it is determined that the veteran was interned in climatic conditions consistent with the occurrence of frostbite  
Post-traumatic osteoarthritis

(Authority: 38 U.S.C. 210(c))

6. In § 3.342, paragraph (b)(4)(ii) is revised to read as follows:

#### § 3.342 Permanent and total disability ratings for pension purposes.

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(ii) Participation in, or the receipt of a distribution of funds as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 618.

(Authority: 38 U.S.C. 618(f))

\* \* \* \* \*

7. In § 3.343, the last sentence in paragraph (c)(1) is revised to read as follows:

#### § 3.343 Continuance of total disability ratings.

\* \* \* \* \*

(c) Individual unemployability. (1) \* \* \* Neither participation in, nor the receipt of a distribution of funds as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C.



618 shall be considered evidence of employability.

(Authority: 38 U.S.C. 618(f))

8. Section 3.383 is revised to read as follows:

**§ 3.383 Special consideration for paired organs and extremities.**

(a) Entitlement criteria. Compensation is payable for the combinations of service-connected and nonservice-connected disabilities specified in paragraphs (a)(1) through (a)(5) of this section as if both disabilities were service-connected, provided the nonservice-connected disability is not the result of the veteran's own willful misconduct.

(1) Blindness in one eye as a result of service-connected disability and blindness in the other eye as a result of nonservice-connected disability.

(2) Loss or loss of use of one kidney as a result of service-connected disability and involvement of the other kidney as a result of nonservice-connected disability.

(3) Total deafness in one ear as a result of service-connected disability and total deafness in the other ear as a result of nonservice-connected disability.

(4) Loss or loss of use of one hand or one foot as a result of service-connected disability and loss or loss of use of the other hand or foot as a result of nonservice-connected disability.

(5) Permanent service-connected disability of one lung, rated 50 percent or more disabling, in combination with a nonservice-connected disability of the other lung.

(b) *Effect of judgment or settlement.*

(1) If a veteran receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the nonservice-connected disability which established entitlement under this section, the increased compensation payable by reason of this section shall not be paid for any month following the month in which an such money or property is received until such time as the total amount of such increased compensation that would otherwise have been payable equals the total of the amount of any such money received and the fair market value of any such property received. The provisions of this paragraph do not apply, however, to any portion of such increased compensation payable for any period preceding the end of the month in which such money or property of value was received.

(2) With respect to the disability combinations specified in paragraphs (a)(1), (a)(2), (a)(3) and (a)(5) of this section, the provisions of this paragraph apply only to awards of increased compensation made on or after October 28, 1986.

(c) *Social security and workers' compensation.* Benefits received under social security or workers' compensation are not subject to recoupment under paragraph (b) of this section even though such benefits may have been awarded pursuant to a judicial proceeding.

(d) *Veteran's duty to report.* Any person entitled to increased compensation under this section shall promptly report to the VA the receipt of any money or property received pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the nonservice-connected loss or loss of use of the paired extremity upon which entitlement under this section is based. The amount to be reported is the total of the amount of money received and the fair market value of property received. Expenses incident to recovery, such as attorneys' fees, may not be deducted from the amount to be reported.

(Authority: 38 U.S.C. 360)

**§ 3.384 [Removed]**

9. Section 3.384 is removed.

10. In § 3.501, paragraph (i)(3) is revised to read as follows:

**§ 3.501 Veterans.**

(i) \* \* \*

(3) *Section 3.557.* Incompetent veteran, admitted for hospital, institutional or domiciliary care, without dependents, whose estate equals or exceeds \$1,500: Last day of the month of admission or the last day of the month in which the veteran's estate equals or exceeds \$1,500, whichever is later. If the veteran was hospitalized for observation and examination, the date treatment began will be considered the date of admission.

(Authority: 38 U.S.C. 3012(c))

11. In § 3.502, the heading, introductory text and paragraph (c) are revised to read as follows:

**§ 3.502 Surviving spouses.**

The effective date of discontinuance of pension, compensation, or dependency and indemnity compensation to or for a surviving spouse will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be

payable the day following the date of discontinuance of the greater benefit.

(Authority: 38 U.S.C. 210(c))

(c) *Legal surviving spouse entitled.* Date of last payment on award to another person as surviving spouse. See § 3.657.

(Authority: 38 U.S.C. 210(c))

12. In § 3.503, the introductory text and paragraphs (b) and (i) are revised as follows:

**§ 3.503 Children.**

The effective date of discontinuance of pension, compensation, or dependency and indemnity compensation to or for a child, or to or for a veteran or surviving spouse on behalf of such child, will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.

(Authority: 38 U.S.C. 210(c))

(b) *Enters service.* Date of last payment of apportioned disability benefits for child not in custody of estranged spouse. Full rate payable to veteran. No change where payments are being made for the child to the veteran, his (her) estranged spouse, his (her) surviving spouse, or to the fiduciary of a child not in the surviving spouse's custody.

(Authority: 38 U.S.C. 210(c))

(i) *Surviving spouse becomes entitled.* Date of last payment. See § 3.657.

(Authority: 38 U.S.C. 210(c))

13. In § 3.557, the first sentence of paragraphs (b)(4) and (d), and all of paragraph (c) are revised to read as follows:

**§ 3.557 Incompetents; estate over \$1,500 and institutionalized.**

\* \* \* \* \*

(b) \* \* \*

(4) Has an estate, derived from any source, which equals or exceeds \$1,500, further payments of pension, compensation or emergency officer's retirement pay will not be made, except as provided in paragraph (d) of this section, until the estate is reduced to \$500.

\* \* \* \* \*

(c) For veterans subject to paragraph (b) of this section, the value of the veteran's estate shall be computed



under the provisions of § 13.109 of this title.

(Authority: 38 U.S.C. 210(c))

(d) Payment of pension, compensation or emergency officers' retirement pay to a veteran subject to the provisions of paragraph (b) of this section will be discontinued the last day of the month of admission or the last day of the month in which the veteran's estate equals or exceeds \$1,500, whichever is later.

(Authority: 38 U.S.C. 3203)

14. In § 3.800, paragraph (a)(2) is amended by adding a sentence at the end and revising the authority citation to read as follows:

**§ 3.800 Disability or death due to hospitalization, etc.**

(a) \* \* \*  
(2) \* \* \* The provisions of this paragraph do not apply, however, to any portion of such compensation or dependency and indemnity compensation payable for any period preceding the end of the month in which such judgment, settlement or compromise becomes final.

(Authority: 38 U.S.C. 210(c))

15. In § 3.809a, the introductory text is revised to read as follows:

**§ 3.809a Special home adaptation grants under 38 U.S.C. 801(b).**

A certificate of eligibility for assistance in acquiring necessary special home adaptations, or, on or after October 28, 1986, for assistance in acquiring a residence already adapted with necessary special features, under 38 U.S.C. 801(b) may be issued to a veteran who served after April 20, 1898, if the following requirements are met:

(Authority: 38 U.S.C. 801(b))

[FR Doc. 87-22654 Filed 10-2-87; 8:45 am]

BILLING CODE 8320-01-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[FRL-3272-8]

#### Approval and Promulgation of Implementation Plans; California; Ozone and Carbon Monoxide Attainment Plans

AGENCY: Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; extension of public comment period.

**SUMMARY:** In two separate notices published on July 14, 1987 (52 FR 26428 and 52 FR 26431) EPA proposed disapproval of the ozone and carbon monoxide (CO) State Implementation Plans for five areas in California. The areas are Kern (ozone), Sacramento (ozone), Ventura (ozone), Fresno (ozone and CO), and South Coast (ozone and CO). The public comment period for these notices began on the date of publication and ended September 14, 1987 (60 days). EPA has received four written requests for an extension of time for public comment. EPA has evaluated these requests and is hereby granting a thirty (30) day extension of the public comment period for these two notices.

**DATES:** Comments may now be submitted up to October 14, 1987.

**FOR FURTHER INFORMATION CONTACT:** Wally Woo, Chief, State Liaison Section, EPA, Region 9 (A-2), Air Management Division, 215 Fremont Street, San Francisco, CA 94105, (415) 974-7634; FTS 454-7634.

Authority: 42 U.S.C. 7401-7642.

Date: September 23, 1987.

John Wise,

Acting Regional Administrator.

[FR Doc. 87-22915 Filed 10-2-87; 8:45 am]

BILLING CODE 6560-50-M

### 40 CFR Part 52

[FRL-3272-9; NC-034]

#### Approval and Promulgation of Implementation Plans; North Carolina; Miscellaneous Regulatory Changes

AGENCY: Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** On April 14, 1987, North Carolina Division of Environmental Management submitted regulatory amendments for incorporation into their federally approved State implementation plan (SIP). The submittal included changes to eight different regulations. Three of these regulatory amendments are being processed in other Federal Register notices. In this notice, EPA proposes to approve the other five amendments.

The changes to regulations 2D.0103 and 2H.0607 correct an address which indicates where information can be obtained. The change to 2D.0501, Compliance with Emission Control Standards, updates and replaces outdated ASTM methods. The amendment to 2D.0505, Control of

Particulates from Incinerators, offers an alternative particulate emission level. Finally the addition to 2D.0533, Stack Height, adds the definition of emission limitation, as requested by EPA.

**DATES:** To be considered, comments must be received on or before November 4, 1987.

**ADDRESSES:** Comments should be addressed to Bob Peddicord at the Region IV EPA address below. Copies of the State's submittal are available for review during normal business hours at the following locations:

Air Quality Section, Division of Environmental Management, North Carolina Department of Natural Resources and Community Development, Archdale Building, 512 North Salisbury Street, Raleigh, North Carolina 27611

Air Programs Branch, Region IV, U.S. Environmental Protection Agency, 345 Courtland Street NE., Atlanta, Georgia 30365.

**FOR FURTHER INFORMATION CONTACT:** Bob Peddicord of the Region IV EPA Air Programs Branch, at the above address and the following phone: (404) 347-2864, or FTS 257-2864.

**SUPPLEMENTARY INFORMATION:** On April 14, 1987, the State of North Carolina submitted eight revisions to their State Implementation Plan (SIP). The revisions were adopted by the Environmental Management Commission on April 9, 1987, after a public hearing held on January 20, 1987. Changes to three regulations, 2D.0524—New Source Performance Standards, 2D.0525—National Emission Standards for Hazardous Air Pollutants, and 2D.0528—Total Reduced Sulfur from Kraft Pulp Mills are all being processed in separate notices.

Amendments to regulations 2D.0103, .0501, .0505, .0533 and 2H.0607 are being proposed for approval here. The amendments are described below.

#### 2D.0103—Copies of Referenced Federal Regulations

The change in this regulation is to correct the address of the recently moved Winston-Salem regional office.

#### 2D.0501—Compliance With Emission Control Standards

The amendments here clarify the ASTM methods used. The State is specifying the years that the ASTM methods were last certified. The State is also replacing ASTM D270, which has been withdrawn by ASTM, with a sampling method of their own. The new method is at least as restrictive as the old ASTM method. It should be noted



that these fuel sampling methods will be the subject of a future SIP revision where the sampling frequency will be specified to ensure the short-term SO<sub>2</sub> emission limits can be adequately checked for compliance.

#### 2D.0505—Control on Particulates From Incinerators

The proposed changes to this regulation would allow an operator to choose a new emission limit of 0.08 grains per dry standard cubic foot, which is the federal new source performance standard. The current federally approved limit is a pounds per hour standard. If this option is chosen, a demonstration that the use of the new limit will not cause an ambient air quality standard violation will be required. The option of using the new standard represents a relaxation to three sources in the State. EPA has indicated to the State, and the State has agreed, that any new permits associated with the action need not be part of a SIP revision, but the sources, prior to adopting the new limit, should submit to EPA for approval, an air quality demonstration. If EPA does not approve the demonstration the source may revert to the original emission limit or the State may model rework the demonstration and submit it at a later date as a single source SIP revision. The three sources to which this option represents a relaxation are Rocky Mount Waste Water Treatment Plant, Mitchell Systems, and City of Greensboro, North Buffalo Plant.

On July 1, 1987 (52 FR 24646) EPA promulgated a new particulate National Ambient Air Quality Standard (NAAQS) to regulate particles that are 10 micrometers or less in diameter. This standard becomes effective July 31 and replaces the total suspended particulate standard. The air quality demonstrations required prior to adopting the proposed 0.08 grains per day standard cubic foot limit will need to include demonstrations that the new particulate standard will not be violated.

#### 2D.0533—Stack Height

The definition of emission limitation is being added to this rule. EPA, when proposing to approve the original North Carolina stack height regulation, requested that this be added. North Carolina is complying with that request.

#### 2H.0607—Copies of Referenced Documents

Here as in 2D.0103 the address of the Winston-Salem regional office is being changed.

#### Proposed Action

EPA is proposing to approve the revisions to North Carolina's regulations 2D.0103, 2D.0501, 2D.0505, 2D.0533 and 2H.0607, submitted to EPA on April 14, 1987. The changes in the regulations are consistent with EPA policy and requirements.

All interested persons are invited to comment on this action. Comments received within 30 days of the publication of this notice will be considered by EPA in the final rulemaking.

Under 5 U.S.C. section 605(b), I certify that this action will not have a significant impact on a substantial number of small entities. (See 46 FR 8709).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

#### List of Subjects in 40 CFR Part 52

Air pollution control,  
Intergovernmental relations.

Authority: 42 U.S.C. 7401-7642.

Date: July 21, 1987.

Joe R. Franzmathes,  
Acting Regional Administrator.

[FR Doc. 87-22916 Filed 10-2-87; 8:45 am]

BILLING CODE 6560-50-M

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Health Care Financing Administration

##### 42 CFR Parts 405 and 413

[BERC-381-P]

##### Medicare Program; Payment for Physicians' Outpatient Maintenance Dialysis Services and Other Physicians' Services for ESRD Patients

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

**SUMMARY:** This proposed rule would reinstate a modified version of the initial method of payment for physicians' dialysis services, and clarify and modify some of the principles of the monthly capitation payment method. Under both the initial method and the monthly capitation payment, we would specify that, to be payable, physicians' services must meet certain requirements for services furnished to individual patients, as distinguished from services furnished to the facilities. The reinstatement of a modified version of the initial method is necessitated by a court decision.

**DATE:** To be considered, comments must be mailed or delivered to the appropriate address, as provided below, and must be received by 5:00 p.m. on December 4, 1987.

**ADDRESS:** Mail comments to the following address:

Health Care Financing Administration,  
Department of Health and Human  
Services, Attention: BERC-381-P, P.O.  
Box 26676, Baltimore, Maryland 21207

If you prefer, you may deliver your comments to one of the following addresses:

Room 309-G, Hubert H. Humphrey  
Building, 200 Independence Avenue  
SW., Washington, DC, or  
Room 132, East High Rise Building, 6325  
Security Boulevard, Baltimore,  
Maryland.

Please address a copy of comments on information collection requirements to:

Office of Information and Regulatory  
Affairs, Office of Management and  
Budget, Room 3208, New Executive  
Office Building, Washington, DC  
20503, Attention: Desk Officer for  
HCFA

In commenting, please refer to file code BERC-381-P. Comments will be available for public inspection as they are received, beginning approximately three weeks after publication of this document, in Room 309-G of the Department's offices at 200 Independence Avenue SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (phone: 202-245-7890).

**FOR FURTHER INFORMATION CONTACT:**  
Robert Niemann, (301) 597-1810.

#### SUPPLEMENTARY INFORMATION:

##### I. Background—Physicians' Outpatient Maintenance Dialysis Services

Physicians' services to End-Stage Renal Disease (ESRD) patients undergoing dialysis in a facility approved to furnish outpatient maintenance dialysis (ESRD facility) are payable if the services are otherwise covered by the Medicare program and if they are reasonable and medically necessary. Before August 1, 1983, the Medicare program paid for physicians' outpatient maintenance dialysis services under one of two methods—the "initial method" or the "alternative reimbursement method" (ARM). Section 1881(b)(3) of the Social Security Act (the Act) confirmed our authority to establish those methods of reimbursement.

Under the ARM, all physicians' outpatient maintenance dialysis services (except declothing of shunts) were paid



through a single monthly payment to the physician. Under the initial method, the payment for physicians' "supervisory services" was made to the dialysis facility as part of the facility's dialysis treatment payment rate. (Physicians' supervisory services are listed in the regulations located at 42 CFR 405.542(b)(1) and include monitoring and evaluating the patient during dialysis, reviewing psychosocial and dietary issues, etc.) This payment was made in the form of a higher facility payment rate (the usual facility rate plus an add-on amount) than the rate the facility received when the physicians' services were paid under the ARM. The physician then negotiated his/her compensation with the facility. The physician's other professional services to dialysis patients (that is, services not included under the initial method payment, such as monthly examinations and emergency services) were paid on a fee for service, reasonable charge basis by the Medicare Part B carrier.

In the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35) Congress amended section 1881(b)(3) of the Act to require that physician reimbursement be made in a way that promotes the increased use of home dialysis. To accomplish this, on May 11, 1983, under the authority of section 1881(b)(3)(B), we published in the *Federal Register* final regulations located at 42 CFR 413.170 and 42 CFR 405.542 (48 FR 21254) that were effective on August 1, 1983. These regulations changed the payment system for outpatient maintenance dialysis and related physician and laboratory services. They also established a prospective method of payment for maintenance dialysis, whether furnished at home or in a hospital-based or independent dialysis facility, and revised other aspects of the payment system to encourage home dialysis and provide incentives for economy and efficiency in furnishing dialysis services. In those regulations, we eliminated the initial method and modified the ARM to create the monthly capitation payment (MCP) method.

The main difference between the ARM and the MCP is that, under the ARM, the monthly payment for home patients had been set at 70 percent of the payment for infacility patients, whereas, under the MCP, monthly payments for services to home and infacility patients are equal. This creates a substantial incentive for physicians to accept and encourage home dialysis. The initial method did not promote the use of home dialysis because physicians do not furnish "routine physicians' services" to home patients (since the

dialysis takes place at home) and rarely furnish services to home dialysis patients at other times for which physicians may be paid. Furthermore, the General Accounting Office had found problems with duplicate payments under both the initial method and ARM (GAO Report GAO/HRD-85-14; February 1, 1985); that is, in some cases the Medicare program apparently was being billed under both the initial method and the ARM. Thus, we expected to solve several problems by establishing a single payment method with substantial incentives for home treatment.

## II. Basis For Reinstating a Modified Version of the Initial Method

On June 11, 1984, the U.S. District Court for the District of Columbia, in *National Association of Patients on Hemodialysis and Transplantation Inc. et al. (NAPHT), v. Heckler*, 558 F. Supp. 1108 (D.D.C. 1984), ordered the Secretary to reinstate a modified version of the initial method designed to advance the congressional purpose of encouraging home dialysis, any administrative inconvenience notwithstanding. The plaintiffs in that case suggested two ways to accomplish this:

- (1) Confine the initial method to physicians' services rendered to infacility patients; or
- (2) Extended the initial method to cover both infacility and home dialysis in the same manner.

Plaintiffs had offered these same suggestions during the comment period following our February 12, 1982 notice of proposed rulemaking (47 FR 6566-6567). Either of these suggestions would promote home dialysis to a greater extent than the original initial method because in either case physicians would be paid for their home patients without regard to the nature of the specific services furnished to each individual patient.

In view of the plaintiffs' suggestions, we considered paying the initial method add-on only for the physician's infacility patients and paying for the physician's home dialysis patients under the MCP method. We rejected this option because it would be difficult for carriers to track whether a particular home dialysis patient was dialyzed at home for an entire month. If a patient were dialyzed in the facility for any part of the month, it would be necessary to pay a prorated portion of the MCP to the physician while the patient was home, and to pay the add-on-amount to the facility while the patient was in the facility.

We rejected the option to reinstate the prior add-on of \$12 because we have reduced the MCP rates from the

previous ARM rates based on a lower estimate of physician involvement in both infacility and home services. It would be inconsistent not to apply the same reduction to the initial method.

We also rejected the option to pay a physician for home dialysis services using the prevailing charge for a physician's brief followup office visit because the MCP rate is based in part on a physician's brief followup office visit times the average number of dialysis treatments per month, and this includes services that are furnished at times other than during a dialysis. It would be inappropriate to pay the same amount under the initial method for a narrower range of services.

We propose to adjust the initial method add-on in the same manner as we adjusted the previous ARM payment (in effect for services furnished prior to August 1, 1983) to compute the present MCP payment amounts (in effect for services furnished on or after August 1, 1983).

This adjustment is done by first revising the estimate of the amount of physician involvement in treating maintenance dialysis outpatients; and then combining into one composite payment a monthly amount that is paid for infacility and home dialysis. The additional payment would be added to the labor portion of the composite rate and multiplied by the hospital wage index to account for geographic variations in physicians' remuneration. (As data become available on the nature of the physicians' services furnished and the value of those services, we will examine the appropriateness of using the hospital wage index to measure variations in physician charges.)

The specific methodology for setting rates under the initial method is described in detail in section IV, below. Section V.A. clarifies which physicians' services would be included under the initial method add-on payment.

For administrative purposes, we would require, as was required previously under the initial method, that physicians could be paid under the initial method only if all of the ESRD physicians in the ESRD facility who furnish services to patients on maintenance dialysis or undergoing self-dialysis training elect the initial method. The election of this method of payment covers all infacility and home dialysis patients the physician attends in or through that facility. Physicians must submit a statement of agreement concerning their election of the initial method; in the absence of an election the carrier will assume that the



physician intends to accept payment under the MCP method.

### III. Principles for Determining Which Physicians' Services are Services for Individual Patients

Extending the initial method to include payment related to services in the home would encourage home dialysis and thus conform to congressional intent. However, in considering the problems attendant to reinstatement of the initial method, we concluded that merely making this modification would not adequately address other problems we have encountered concerning payment for services physicians furnish for ESRD patients. One of these problems is making a consistent and proper distinction between services a physician furnishes to individual patients and those other services the physician performs for the facility, which certainly are of general benefit to the facility's patients, but which we would not consider to be physicians' services reimbursable on a reasonable charge basis.

We have experienced this problem since the beginning of the Medicare program, particularly in regard to physicians' services for patients in hospitals and other providers. From the beginning of the program we have held that, to be paid on a reasonable charge or other related basis, a physician's services must be personally furnished to an individual patient. This distinction between physicians' services to individual patients and physicians' services that benefit patients generally has been expressed in our regulations since the beginning of the Medicare program in 1966. Our payment principles require that payment for physicians' services to the provider should be made to the provider, and that compensation to the physician for those services should come from the provider, rather than be paid for as if the services were services to individual patients.

Our initial regulations regarding this distinction were not sufficiently detailed and explicit to be fully and consistently administrable. In response to problems that arose in our long-standing effort to implement this basic principle, section 108 of Pub. L. 97-248 (the Tax Equity and Fiscal Responsibility Act of 1982, enacted September 3, 1982) provided for the addition of a new section 1887 of the Act dealing explicitly with distinguishing between physicians' professional services to patients and services to providers. Thus, the statute now affirms the distinction we had been making. Regulations implementing section 1887 of the Act are located at 42

CFR 405.480 to 405.482, and 405.550 to 405.557 (published 48 FR 8902; on March 2, 1983).

However, independent ESRD facilities are not providers, and are not subject to the requirements of section 1887 of the Act. Further, we have, as a matter of policy, been paying hospital-based and independent ESRD facilities for their ESRD services in basically the same way, with only minor necessary differences. Therefore, we have not applied the final regulations implementing section 1887 of the Act either to the hospital-based or the independent ESRD facility setting.

We have, however, continued to experience some of the same problems with regard to physicians' services furnished in ESRD facilities as we had experienced with regard to services in hospitals, skilled nursing facilities (SNFs), and comprehensive outpatient rehabilitation facilities (CORFs) prior to issuance of the March 2, 1983 final rules. That is, we have not always been able to distinguish consistently and accurately those physicians' services that are services to the facility, rather than services to individual patients, and for which payment should flow through the facility. We are concerned that the costs taken into account under section 1881(b)(2) of the Act, for purposes of establishing facility composite rates under section 1881(b)(7) of the Act, be determined in a manner that appropriately reflects the costs to ESRD facilities for physicians' services to the facilities. In order to ensure that payments are accurate and accomplish the objectives of the statute, we are also concerned to ensure that payments made to physicians for services to individual patients are not also inadvertently compensating physicians for services furnished to ESRD facilities.

Accordingly, we are proposing to establish rules governing payment for physicians' services furnished in ESRD facilities that are consistent with the rules for physicians' services furnished in hospitals, SNFs, and CORFs. We recognize that the authority established under section 1887 of the Act does not extend to independent ESRD facilities, since they are not providers (although, under section 1881(b)(2)(D) of the Act and 42 CFR 413.170(h), ESRD facilities are treated as providers for some purposes). Responsible management of the program requires that we make some distinction between services covered under two different payment mechanisms (for example, under the composite rate paid to facilities and the MCP paid to physicians), and ensure that the program does not pay twice for

the same services. We believe that it is reasonable to make this distinction for ESRD services on the same basis as that which is historically established and already implemented for analogous services paid for by Medicare.

For these reasons we would define "physicians' services to an ESRD facility" in the same terms as are used for "physicians' services to a provider". Accordingly, consistent with our regulations at 42 CFR 405.480 to 405.482, physicians' services to an ESRD facility would include, but would not be limited to, teaching or supervision of professional or technical personnel, administration or management of a facility or department, quality control activities, and work schedule planning. The costs of physicians' services to the facility would be allowable (and included under the prospectively set composite rates) if—

- The services do not meet the criteria for reasonable charge reimbursement;
- The services do not include physician availability services;
- The facility has incurred a cost for the services; and
- The costs of the services meet the requirements in 42 CFR 413.9 regarding costs related to patient care.

The criteria for determining whether physicians' services furnished to a facility patient would be reimbursable on a reasonable charge basis or under the MCP or initial method, consistent with our regulations at 42 CFR 405.550(b), would be that:

- The services must be personally furnished for an individual patient by a physician;
- The services must contribute directly to the diagnosis or treatment of an individual patient; and
- The services ordinarily require performance by a physician.

We believe these same distinctions are applicable to hospital-based and freestanding ESRD facilities, which are both paid under prospectively determined composite rates. By applying these principles to ESRD facilities, whether provider-based or not we would be able to distinguish, in a manner consistent with principles and practices established in other parts of the Medicare program, between those physicians' services that should be included in payments to the facility, as part of the facility's composite rate, and those to be paid on a basis related to reasonable charges, including either the MCP or the initial method.



#### IV. Ratesetting Under the Proposed Initial Method

The proposed initial method (IM) add-on amount would be calculated as follows:

1. Start with the original \$12 IM add-on.
2. Calculate the average ARM infacility rate:  

$$[\$260 \text{ (max.)} + \$180 \text{ (min.)}] \text{ divided by } 2 = \$220.$$
3. Calculate the average MCP rate:  

$$[\$203 \text{ (max.)} + \$132 \text{ (min.)}] \text{ divided by } 2 = \$167.50.$$
4. Calculate the ratio between steps 3 and 2.  

$$\$167.50 / \$220 = .7614.$$
5. Multiply \$12 (step 1) by ratio in step 4:  

$$\$12 \times .7614 = \$9.14 \text{ (new IM add-on amount).}$$

In the final notice published in the *Federal Register* on August 15, 1986 (51 FR 29404) we continued the lower and upper limits on the facility ESRD composite rate originally provided in the preamble to the final regulation published May 11, 1983 (48 FR 21254). This was to limit the effect of the wage index, which otherwise would have caused a great variation in the composite rates. The lower limit was set by using a minimum wage index of 0.9. The upper limit was set at the previous ESRD facility payment screen of \$138 per treatment. Under the reinstated initial physician reimbursement method we propose that the same minimum wage index of 0.9 be used, resulting in a minimum add-on of \$8.23 ( $0.9 \times \$9.14$ ). We propose to set the revised upper limit at the previous initial physician reimbursement method ESRD facility payment screen of \$150 per treatment (that is \$138 plus the \$12 IM add-on).

#### V. Summary of Proposed Changes to the Regulations

##### A. Section 405.542—Criteria For Determination of Reasonable Charges For Physicians' Services Furnished to Renal Dialysis Patients

1. We are proposing to clarify in § 405.542(a) that physicians' services to dialysis patients include physicians' routine professional services, administrative services, and other physicians' services. We are proposing to amend the regulations to indicate that physicians may be paid under the "Initial Method" after the effective date of these regulations. This section would also provide that physicians' services furnished on or after August 1, 1983 and before the effective date of this

proposed regulation are reimbursed only under the monthly capitation method.

2. We propose to add a new § 405.542(a)(2)(i) to list physicians' routine professional services and require that the services be furnished during a visit to the patient where the physician is physically present with the patient, examines the patient or reviews the patient's medical record, and in response to this examination or review, furnishes whatever physicians' services are medically necessary. This section would specify the conditions under which services would be paid under the initial method add-on to the facility's rate. If these criteria are not met, the physician's services could only be paid by the facility, and the costs of those services would be included in the facility's dialysis treatment costs used to set the ESRD facility composite rate.

The payment to the facility under the initial method covers all physicians' non-surgical services furnished during the outpatient maintenance dialysis session, including non-renal-related physicians' services; that is, services not related to the patient's ESRD. The only surgical service covered by the initial method payment is insertion of a catheter for patients on peritoneal dialysis who do not have an indwelling catheter. If separate payment were permitted for non-renal-related physicians' services furnished during the dialysis session, Medicare carriers would be required to decide which services are renal-related and which are not, a distinction that is extremely difficult to make and one upon which experts could disagree. Also, we do not believe dialysis physicians commonly furnish non-renal-related services during the dialysis session. This policy is consistent with the monthly capitation payment (MCP) system; non-renal-related physicians' services are included under the MCP unless a separate visit, not necessitated by the patient's renal condition, is required. While we are now including services under the initial method add-on payment to the facility that were not previously included (for example, physicians' non-surgical non-renal-related services furnished during a dialysis session), this added obligation is balanced by the additional payment that would be made for home dialysis treatments.

Section 1881(b)(1)(A) of the Act provides that payments for "routine professional services performed by a physician during a maintenance dialysis episode" be made to the dialysis facility and not to the physician. Section 1881(b)(3)(A) reaffirms this provision by effectively stating that under the initial method payment for physicians' routine

service furnished during a maintenance dialysis episode may not be made on a reasonable charge basis. Therefore, for purposes of distinguishing the services furnished during a dialysis session, which under the initial method are payable only to the dialysis facility, from other physicians' services, which are payable on a reasonable charge basis, we propose to define the term "during a dialysis session". In the context of infacility dialysis, it means the period of time beginning with the patient's arrival at the dialysis facility and ending with the patient's departure from the facility. In the case of home dialysis, it means the period beginning when the patient prepares for dialysis until the session ends (this is generally when the patient is disconnected from the machine).

3. We propose to add a new § 405.542(a)(2)(ii), clarifying that administrative services are services provided to the facility and not to an individual patient. As such they are reimbursable to the facility under the composite payment rate described in § 413.170, and not to the physician by the Medicare carrier under either the initial method or the MCP. (We would also continue to apply this principle as it has always been applied when we review facility costs for purposes of setting the facility composite rate.) Administrative services are differentiated from routine professional services and other physicians' services related directly to an individual patient's care because they are of benefit to all of the patients as a whole as well as to the facility. We have deleted as an example of such services "supervising staff for other than direct patient care services" and retained "supervising staff" because all staff supervision would be defined as administrative services.

4. We also propose to add a new § 405.542(a)(2)(iii) and (iv), clarifying the difference between a physician's service that is "supervision" and one that is "direction". This distinction applies to all physicians' ESRD services (including services under both the initial method and the MCP method). The carrier will pay for services of physicians to facility patients on a reasonable charge-related basis only if the following requirements are met:

- The services are personally furnished for an individual patient by a physician;
- The services contribute directly to the diagnosis or treatment of an individual patient; and
- The services ordinarily require performance by a physician.



"Supervision" refers to a general activity primarily concerned with monitoring the performance of and giving guidance to medical staff (for example, nurses, dialysis technicians) with significantly diminished direct involvement in delivering services to the patient (for example, when the physician is not physically present with the patient). "Direction", on the other hand, includes substantial direct involvement and physical presence of the physician in delivering services directly to the patient.

5. We propose to revise § 405.542(b)(1) to eliminate any reference to availability of physicians, since Medicare does not cover "availability", in itself, because it is not a service. We are also proposing to revise the effective date so that the paragraph applies to payment for services furnished after the effective date of these regulations. The reference to "supervisory services" would be changed to "routine professional services", for the reasons stated in paragraph 4, above. Previously, services rendered during dialysis which are nonroutine, for example, declothing of shunts, needle insertions into fistulae, supervision of blood transfusions, care during immediately life-threatening complications related to the dialysis procedure, and care of nonrenal conditions were not covered under the initial method add-on and, therefore, were payable directly to the physician by the carrier. This would be changed so that the only physicians' services furnished during the dialysis that would be separately payable would be surgical services. We are including all non-surgical services for the reasons stated above. We are excluding surgical services from the list of services covered under the initial method because:

- Usually, surgical services are furnished to dialysis patients at a time other than during a maintenance dialysis, and usually by a physician other than the physician responsible for the patient's dialysis care; and
- Carriers can easily distinguish between surgical and non-surgical services for purposes of determining physicians' services that are paid in addition to the initial method add-on payment.

6. We propose to add a new paragraph 405.542(b)(2), requiring that, for administrative purposes, physicians may be paid under the initial physician reimbursement method only if all of the ESRD physicians in the ESRD facility who furnish services to patients on maintenance dialysis or undergoing self-dialysis training elect the same method of reimbursement. The election of this method of reimbursement covers all

infacility and home dialysis patients the physician attends in or through that facility. Physicians will submit a statement of agreement concerning their election of the initial method of reimbursement. In the absence of an election the carrier will assume that the physician intends to accept payment under the MCP method.

7. We propose to add a new paragraph to § 405.542(b)(3) to clarify that the factors used in determining the amounts payable under the initial method will be related to program experience, will be reevaluated periodically, and may be adjusted as HCFA determines necessary.

8. We propose to revise § 405.542(c) to require that the physicians' services reimbursable under the MCP must meet requirements specified, which are consistent with those for Part B reimbursable physicians' services listed in 42 CFR 405.550(b)(1) through (b)(3).

We propose to specify in § 405.542(c) that payment for the administration of Hepatitis B vaccine is made in addition to the MCP. This is required by section 1881(b)(11) of the Act.

We also propose to clarify that physicians' services that are not furnished during a dialysis session or a home or office visit necessitated by the renal condition are not included in the MCP, but may be paid in accordance with the usual reasonable charge rules. The physician would have to provide documentation that the services are not related to the treatment of the patient's renal condition and that added visits are required. The carrier's medical staff would determine whether additional payment is warranted for the additional physicians' services.

9. We propose to add § 405.542(c)(1) (v) and (vi) to provide that most surgical services are not covered under the MCP. We would continue to allow additional payment for declothing of shunts and explicitly list it as a surgical service under this paragraph. The only exception to this rule (that is, the only surgical service that is included under the MCP) is insertion of a catheter for a patient on peritoneal dialysis who does not have an indwelling catheter. This is consistent with the prior policy under the initial method.

#### *B. Section 413.170—Payments for Covered Outpatient Maintenance Dialysis Treatments*

We are proposing that, if a physician furnishing services to patients dialyzing in an ESRD facility or at home elects the initial method of reimbursement, the prospective payment rate paid to that facility will be increased by an add-on amount as described in § 405.542(b).

## **VI. Regulatory Impact Statement**

### *A. Executive Order 12291*

Executive Order 12291 (E. O. 12291) requires us to prepare and publish an initial regulatory impact analysis for any proposed regulations that are likely to meet criteria for a "major rule." A major rule is one that would result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or any geographic regions; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The payments to physicians under either the initial method of reimbursement or the monthly capitation payment method would be similar. We do not expect physicians to make major changes in their charging practices as a result of this proposed rule. We expect few physicians to change to the initial physician reimbursement method described in this proposed regulation. We do not expect this proposed regulation to cost or save money. Therefore, it would be considered to be budget neutral. Since we expect no significant economic impact to result from publishing this proposed regulation, we have not prepared an initial regulatory impact analysis.

### *B. Regulatory Flexibility Act*

Consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), we prepare and publish an initial regulatory flexibility analysis for proposed regulations unless the Secretary certifies that the regulations would not have a significant impact on a substantial number of small entities. For purposes of the RFA, we consider all physicians to be small entities. However, as explained with reference to E.O. 12291, we expect no significant economic impact from this proposed rule. Therefore, the Secretary certifies that this proposal would not have a significant impact on a substantial number of small entities. And initial regulatory flexibility analysis is not required.

### *C. Paperwork Reduction Act of 1980*

Section 405.542(b)(2) of this proposed rule contains information collection requirements that are subject to Office of Management and Budget (OMB) approval under the Paperwork



Reduction Act of 1980. Other organizations and individuals desiring to submit comments on the information collection requirements should direct them to the agency official whose name appears in the preamble and to the Office of Information and Regulatory Affairs, OMB, Room 3208, New Executive Building, Washington, DC 20503, ATTN: Allison Herron, Desk Officer for HCFA.

#### VII. Response to Comments

Because of the large number of comments we receive on proposed regulations, we cannot acknowledge or respond to them individually. However, in preparing the final rule, we will consider all comments and respond to them in the preamble to that rule.

#### VIII. List of Subjects

##### 42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Laboratories, Medicare, Nursing homes, Reporting and recordkeeping requirements, Rural areas, X-rays.

##### 42 CFR Part 413

Administrative practice and procedure, Health facilities, Health professions, Kidney disease, Laboratories, Medicare, Nursing homes, Reporting and recordkeeping requirements, Rural areas, X-rays.

We are proposing to amend 42 CFR Part 405 as set forth below:

#### PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

A. Subpart E is amended as follows:

##### Subpart E—Criteria for Determination of Reasonable Charges; Reimbursement for Services of Hospital Interns, Residents, and Supervising Physicians

1. The authority citation continues to read as follows:

Authority: Secs. 1102, 1814(b), 1832, 1833(a), 1842(b), and (h), 1861(b) and (v), 1862(a)(14), 1866(a), 1871, 1881, and 1887 of the Social Security Act as amended (42 U.S.C. 1302, 1395(b), 1395k, 1395l(a), 1395u(b) and (h), 1395x(b) and (v), 1395y(a)(14), 1395cc(a), 1395hh, 1395rr, 1395www and 1395xx).

2. Section 495.542 is amended by revising the title and paragraphs (a) through (c) to read as follows:

##### § 405.542 Criteria for determination of reasonable charges for physicians' services furnished to renal dialysis patients.

(a) *General requirements.*—(1) *Principle.* Physicians' services to renal dialysis patients are reimbursable if the services are otherwise covered by the Medicare program and if they are reasonable and medically necessary. This section applies to all physicians' services furnished to outpatient maintenance dialysis patients in a hospital-based or an independent ESRD facility, or to patients dialyzing at home. For purposes of this section, a dialysis session is the period of time beginning with the patient's arrival at the dialysis facility and ending with the patient's departure from the dialysis facility, or, in the case of home dialysis, it means the period beginning when the patient prepares for dialysis until the session ends (generally when the patient is disconnected from the machine).

(2) *Types of physicians' services.* Physicians' services include:

(i) *Routine professional services.* (A) Routine professional services for patients who are receiving maintenance dialysis in a facility or at home, or self dialysis training in a facility, are those physicians' services, including medical direction as described in paragraph (a)(2)(ii) of this section, that are furnished during a dialysis session and meet the following criteria:

(1) The services are personally furnished for an individual patient by a physician;

(2) The services contribute directly to the diagnosis or treatment of an individual patient; and

(3) The services ordinarily require performance by a physician.

(B) Routine professional services include at least all of the following when medically appropriate:

(1) Visiting the patient during dialysis, reviewing laboratory test results, nurses' notes and any other medical documentation, and in response to this review;

(i) Adjusting medication, the dialysis procedure, the patient's diet;

(ii) Prescribing medical supplies; and

(iii) Evaluating the patient's psychosocial status and the appropriateness of the patient's treatment modality.

(2) Directing staff (as described in paragraph (a)(2)(ii) of this section) in delivering services to the patient during a dialysis session;

(3) Making pre- and post-dialysis examinations where medically appropriate; and

(4) Inserting catheters for patients on maintenance peritoneal dialysis who do not have an indwelling catheter.

(ii) *Medical direction.* In contrast to supervision, as described in paragraph (a)(2)(iv) of this section, medical direction is a professional service, not an administrative service. It entails substantial direct involvement and physical presence of the physician in delivering services directly to the patient.

(iii) *Administrative services.* Administrative services are those services that are furnished by physicians and that are directly related to the support of the facility. They are not reimbursable under this subpart, but are paid for as part of the facility's prospective payment for dialysis services as described in § 413.170. These services are differentiated from routine professional services and other physicians' services because they are not related directly to an individual patient's care, but are of benefit to all of the patients as a whole as well as to the facility. Examples of such services include staff training, participating in the management of the facility, advising on procurement of facility supplies, supervision of staff, and staff conferences.

(iv) *Supervision.* Supervision is an administrative service and is therefore not reimbursable under this Subpart. It is a general activity primarily concerned with monitoring performance of and giving guidance to other health care personnel (for example, nurses, dialysis technicians) with significantly diminished direct involvement (for example, when the physician is not physically present with the patient) in delivering services to the patient.

(3) *Payment for physicians' routine professional services.* Physicians' routine professional services furnished after [the effective date of these regulations] may be reimbursed under either the "Initial Method" described in paragraph (b) of this section, (if all of the physicians at the facility elect the initial method) or under the "Physician Monthly Capitation Payment Method" described in paragraph (c) of this section. Physicians' services furnished on or after August 1, 1983 and before [the effective date of these regulations] are reimbursable only under the monthly capitation method as described in paragraph (c) of this section.

(b) *Initial method of payment for physicians' services furnished after [the effective date of these regulations].* Under this method, payments for routine professional services and medical direction, as described in paragraphs



(a)(2)(i) and (ii) of this section, provided by physicians to outpatient maintenance dialysis patients are paid to the facility by the intermediary. The reimbursement is made in the form of an add-on amount to the facility's composite rate payment, which is described in 42 CFR 413.170.

(1) *Services not included under payment.* Physicians' administrative services, including supervision of staff, are considered to be facility services (see paragraphs (a)(2)(iii) and (iv) of this section) and are paid for under the facility's composite rate. Physicians' services that must be furnished at a time other than during the dialysis procedure (for example, monthly and semi-annual examinations to review health status and treatment) and most physician's surgical services (see paragraph (c)(2)(v) of this section) are reimbursable to the physician (or to the beneficiary) by the carrier in accordance with the reasonable charge criteria set forth in § 405.502. Physicians' services furnished to hospital inpatients who were not admitted solely to receive maintenance dialysis or the administration of hepatitis B vaccine are also reimbursable under those reasonable charge criteria.

(2) *Physician election.* A physician may elect this initial method of reimbursement only if all of the ESRD physicians in the ESRD facility who furnish services to patients on maintenance dialysis or undergoing self-dialysis training elect this method with respect to that facility. The election of this method of reimbursement covers all dialysis patients (including patients dialyzed in the facility and at home) supported by the facility that the physician attends. Physicians must submit a written statement of agreement concerning their election of the initial method of reimbursement to the carrier and intermediary serving the facility. This payment method will be applied to dialysis services furnished in the second calendar month following the month in which all physicians in the facility elect it. Physicians may terminate this payment method by written notice to the servicing carrier and the intermediary servicing the facility at least 60 days before the first day of the calendar month in which the termination is to take effect.

(3) *Determination of payment amount.* The factors used in determining the payment amount under the initial reimbursement method (that is, the initial method add-on amount) will be related to program experience, will be reevaluated periodically, and may be adjusted as determined necessary by HCFA to maintain the payment for the

average initial method physician's services to be commensurate with the prevailing charges of other physicians for comparable services.

(4) *Publication of payment amount.* Revisions to the add-on amounts will be published in the *Federal Register* in accordance with the Department's established rulemaking procedures.

(c) *Physician monthly capitation payment method.* (1) *Services included in monthly payment.* Under this method, all physicians' services, other than those specified in paragraph (c)(2) of this section, furnished to each outpatient maintenance dialysis patient (regardless of the patient's mode of or setting for dialysis) is reimbursed by the carrier on a monthly capitation basis. Services are included in the monthly payment only if the services are personally furnished for an individual patient by a physician: the services contribute directly to the diagnosis or treatment of an individual patient; and the services ordinarily require performance by a physician. Payment of the monthly amount, subject to the deductible and coinsurance, for all such services provided for that month is made by the carrier either to the physician, if the physician accepts assignment, or to the patient, if the physician does not accept assignment. This reimbursement method recognizes the need of patients on maintenance renal dialysis for physicians' services furnished periodically over relatively long periods of time, and is responsive to physicians' charging patterns in their localities. The physician must provide to a patient all physicians' services not listed in paragraph (c)(2) of this section that are required by the patient in a month to qualify for this reimbursement in that month.

(2) *Services not included in monthly payment.* Physicians' services not covered by the monthly payment, which may be reimbursed in accordance with the usual reasonable charge rules, are limited to:

(i) Administration of hepatitis B vaccine.

(ii) Covered physicians' services furnished by another physician during periods when the patient or his attending physician is not available for outpatient services as set out in paragraph (c)(2) of this section.

(iii) Needed physicians services which are rendered either by the physician providing renal care or by another physician and which are beyond those related to the treatment of the patient's renal condition and which are not furnished during a dialysis session or office visit necessitated by the renal condition. The physician must provide

documentation that the services are not related to treatment of the patient's renal condition and that added visits are required. The carrier's medical staff, acting also on the basis of medical consultation obtained by the carrier as may be appropriate, determines whether additional reimbursement is warranted for the additional physicians' services.

(iv) Covered physicians' services furnished to hospital inpatients, including physicians' services related to inpatient dialysis, by a physician who elects not to continue the capitation payment method through the period of the inpatient stay.

(v) Surgical services (including declothing of shunts) other than insertion of catheters for patients on maintenance peritoneal dialysis who do not have an indwelling catheter.

\* \* \*

We are proposing to amend 42 CFR Part 413 as set forth below:

#### **PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT: PAYMENT FOR END-STAGE RENAL DISEASE SERVICES**

B. Subpart H is amended as follows:

##### **Subpart H—Payment for End-Stage Renal Disease (ESRD) Services**

1. The authority citation for Part 413 continues to read as follows:

Authority: Secs. 1102, 1122, 1814(b), 1815, 1833(a), 1861(v), 1871, 1881, and 1886 of the Social Security Act as amended (42 U.S.C. 1302, 1320a-1, 1395l(b), 1395g, 1395l(a), 1395x(v), 1395hh, 1395rr, and 1395ww).

2. In § 413.170, the introductory text of paragraph (c) is revised and a new paragraph (c)(5) is added to read as follows:

##### **§ 413.170 Payments for covered outpatient maintenance dialysis treatments.**

\* \* \*

(c) *Prospective rates for hospital-based and independent ESRD facilities.*

(1) In accordance with section 1881(b)(7) of the Act, HCFA establishes prospective rates by a methodology that:

\* \* \*

(5) If all the physicians furnishing services to patients in an ESRD facility elect the initial method of reimbursement, as described in § 405.542(b), the prospective rate (as described in paragraph (c)(1) of this section) paid to that facility will be increased by an add-on amount as described in § 405.542(b).



(Catalog of Federal Domestic Assistance Program No. 13.744, Medicare-Supplementary Medical Insurance Program)

Dated: June 3, 1987.

William L. Roper,  
Administrator, Health Care Financing  
Administration.

Approved: July 28, 1987.

Otis R. Bowen,

Secretary.

[FR Doc. 87-22930 Filed 10-2-87; 8:45 am]

BILLING CODE 4120-01-M

## Family Support Administration

### 45 CFR Part 233

#### Aid to Families With Dependent Children; Essential Persons

AGENCY: Family Support Administration, HHS.

ACTION: Proposed rule.

**SUMMARY:** This proposed regulation would preclude States from considering individuals who do not provide an essential benefit or service to a family from being considered to be essential persons under the Aid to Families with Dependent Children (AFDC) program. Current regulations do not limit the individuals whom States may include as "essential persons" in payments under the AFDC program. This clarification would ensure that only those individuals who are actually providing an essential benefit or service to the family could receive AFDC payments, if not otherwise eligible.

**DATE:** Interested persons and agencies are invited to submit written comments concerning these regulations no later than November 19, 1987.

**ADDRESSES:** Comments should be submitted in writing to the Administrator of the Family Support Administration, Attention: Mark Ragan, Acting Director, Division of Policy, Office of Family Assistance, 2100 Second Street SW., Washington, DC 20201, or delivered to the Office of Family Assistance, Family Support Administration, Room B-428, Transpoint Building, 2100 Second Street SW., Washington, DC 20201, between 8:00 a.m. and 4:30 p.m. on regular business days. Comments received may be inspected during the same hours by making arrangements with the contact person shown below.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Ragan, Room B-428, Transpoint Building, 2100 Second Street SW., Washington, DC 20201, telephone 202-245-3290.

#### SUPPLEMENTARY INFORMATION:

#### Background

The Social Security Act at sections 402 and 406 and the implementing regulation at § 233.20(a)(2)(vi) permit States, at their option, to include in the AFDC grant benefits for "essential persons." Such individuals are not eligible for AFDC in their own right, but their needs are taken into account in determining the benefits payable to the AFDC family because they are considered "essential to the well-being" of an AFDC recipient in the family.

Twenty-five States currently include the option as part of their respective State Plans. A wide variety of individuals are included as essential persons. The definition and categories of essential persons vary from State to State, including the following:

- Unemployed or incapacitated stepparents living in the home with eligible children and the natural parent;
- Individuals age 18-21 who are not attending school;
- A relative necessary to provide child care or other services because the caretaker is incapacitated or employed;
- A second natural or adoptive parent living in the home;
- The needy spouse of the caretaker relative;
- Stepparents who work fewer than 100 hours per month;
- An unmarried individual who has a child in common with the caretaker relative.

Since 1943, Federal policy has recognized the concept of essential person in the AFDC program. Such benefit or service may be provided directly to a recipient, or provided to someone else in the home so long as the well-being of the recipient is thereby provided.

The Social Security Amendments of 1967 (Pub. L. 90-248) amended sections 402 and 406 of the Act to provide a specific statutory base for an essential person policy. The implementing regulations permit States to specify those individuals considered essential. States are also required to provide recipients with the final decision as to whether individuals are in fact essential. Accordingly, in implementing this provision, the Department has allowed States to simply identify the categories of individuals considered to be essential in their State plans without requiring them to identify the benefits or services that such individuals specifically have to provide in order to be essential.

In light of recent Congressional amendments to title IV-A of the Act, and subsequent changes which States have made in their State plans, we have reevaluated the current regulation. For example: In 1981, Congress amended section 406(a)(2) of the Act to exclude students age 19 to 21 from the definition of a dependent child. Some States then included such children categorically as essential persons, without regard to such individual's provision of an essential benefit or service. This is an indication that some States are using the essential person provision to circumvent and/or avoid Congressional intent.

Three States, in particular, seem to be using the essential person provision to extend benefits to 19 and 20 year-olds. These States account for an estimated 55 percent of all essential persons in the country, but 72 percent of all essential persons aged 19 and 20.

From another perspective, in these three States, we estimate that 45 percent of the 19 and 20 year-olds in the household who are not otherwise receiving benefits as eligible adults, are included as essential persons. In 5 States that explicitly require the provision of essential services, we estimate that only 3 percent of 19 and 20 year-olds are included as essential persons.

Data from the years 1981 and 1982 very strongly suggest that States did in fact shift older children made ineligible by the Omnibus Budget Reconciliation Act of 1981 (OBRA) onto the AFDC rolls as essential persons. In 1981, our data showed 4500 cases with individuals over the age limit (for a dependent child) who were not classified as adult recipients. In 1982, this figure was 23,000 cases—or four times higher. Further evidence comes from examining data from two large States in which 18 to 21-year old recipients previously considered dependent children were apparently converted to essential persons for purposes of Federal matching. There, the 1982 figure for total number of individuals over 18 who were not adult recipients was suspiciously similar to the 1981 number of 18 to 21-year old dependent children. These two States accounted for about 18,000 of the 23,000 cases nationwide.

Today they continue to carry a large number of 18 to 21-year olds as essential persons.

These same two States are using the essential person provision to directly shift the financial burden of State assistance programs to the Federal government. For example, one State specifies that a minor child ineligible for AFDC in his own right, but who is



eligible for General Assistance, may be considered to be essential. The other State includes eligibility for public assistance other than AFDC as a factor in determining essential person status. These two States account for approximately 45% of the total expenditures for essential persons.

In addition to the problems which we identified regarding the categorical inclusion of broad groups of individuals, the Office of Inspector General, in a recent review, discovered other individual situations where persons who were in no position to provide essential benefits or services to an AFDC family were classified as essential. These individuals included a two-year-old and a drug addict. In another case, seven individuals were classified as essential persons for a single AFDC household.

Based on such experience, we are proposing to amend the regulation to emphasize that in order to be considered an essential person, an individual must provide an essential benefit or service. Such essential benefits or services clearly include the provision of child care which enables a caretaker relative to work on a full-time paid basis outside the home, and care for an incapacitated family member in the home. Accordingly, we are including these benefits and services in the proposed regulation. In this connection, we note that the proposed requirements for determining incapacity are similar to those set out at § 233.90(c)(1)(iv) for a State to find that a parent is incapacitated for AFDC purposes. Thus, we expect that States would have little difficulty in making incapacity determinations.

While we are not proposing any additional reporting or recordkeeping requirements, we would expect States, pursuant to 45 CFR 205.60(a) and 206.10(a)(9)(iii), to continue to make periodic determinations that individuals included as essential persons meet the definitional requirements for an essential person and maintain appropriate written documentation in the AFDC case record of the essential person determination. Appropriate documents might include items such as the recipient's request that the individual be included as an essential person, the basis under which the individual was determined to be an essential person, and information necessary to support the determination (such as information on the nature, regularity, and length of service and on the capacity of the individual to provide such an essential benefit or service). In a case where more than one individual was to be classified as an essential

person, such as a case of severe incapacity, the documentation would probably need to include justification of the need for more than one essential person. We invite comment as to whether a specific regulatory change to further clarify this policy would be of value.

Finally, States would still be free to limit essential person status to categories of individuals, such as grandparents, but only if such individuals are actually providing an essential benefit or service. Likewise, States may specify a minimum age for classification of an individual as an essential person.

Since States may have ideas as to additional types of benefits or services that should be considered to be essential, we request suggestions for possible inclusion in the final rule.

#### Regulatory Procedures

##### Executive Order 12291

These proposed regulations have been reviewed under Executive Order 12291 and do not meet any of the criteria for a major regulation. A regulatory impact analysis is not required because the regulation will not:

- (1) Have an annual effect on the economy of \$100 million or more; (The Federal annual savings of these regulatory provisions are estimated to be up to \$41 million a year.)
- (2) Impose a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or
- (3) Result in significant adverse effects on competition, employment, investment, innovation, or the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export markets.

##### Paperwork Reduction Act

There will be no new reporting or recordkeeping requirements imposed on the public or the States which would require clearance by the Office of Management and Budget (OMB).

##### Regulatory Flexibility Act

We certify that this regulation, if promulgated, will not have a significant impact on a substantial number of small entities because it primarily affects State governments and individuals. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96-354, the Regulatory Flexibility Act, is not required. This regulation is issued under the authority of section 1102 of the Social Security Act.

(Catalog of Federal Domestic Assistance Programs 13.780, Assistance Payments Maintenance Assistance)

#### List of Subjects in 45 CFR Part 233

Aliens, Grant program-social programs, Public assistance programs, Reporting and recordkeeping requirements.

Dated: July 24, 1987.

Wayne A. Stanton,  
Administrator of Family Support  
Administration.

Approved: August 10, 1987.

Otis R. Bowen,  
Secretary of Health and Human Services.

#### PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY

1. The authority citation for Part 233 is revised to read as follows and all other authority citations which appear throughout Part 233 are removed:

Authority: Secs. 1, 402, 406, 407, 1002, 1102, 1402, and 1602 of the Social Security Act (42 U.S.C. 301, 602, 606, 607, 1202, 1302, 1352, and 1382 note), and sec. 6 of Pub. L. 94-114, 89 Stat. 579 and Part XXIII of Pub. L. 97-35, 95 Stat. 843, and Pub. L. 97-248, 96 Stat. 324.

2. Section 233.20 is amended by revising paragraph (a)(2)(vi) and adding paragraph (a)(2)(vii) to read as follows:

##### § 233.20 Need and amount of assistance.

- (a) \* \* \*
- (2) \* \* \*

(vi) For OAA, AB, APTD, or AABD, if the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals, (a) specify the persons whose needs will be included in the individual's need, and (b) provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.

(vii) For AFDC, if the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals,

(a) Specify the persons whose needs will be included in the individual's need, but limited to those individuals who regularly provide personal services to an incapacitated family member, or who provide child care service which permits a caretaker relative to work on a "full time" paid basis, outside of the home and

(b) Provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.



A person will be considered incapacitated for purposes of paragraph (a)(2)(vii)(a) of this section, when he has a physical or mental defect, illness, or impairment. The incapacity shall be supported by medical evidence and/or recorded testimony of a licensed health care professional, and must be of such a debilitating nature as to reduce substantially or eliminate his ability to support or care for himself and be expected to last for a period of at least thirty (30) days. A finding of eligibility for OASDI or SSI benefits, based on disability or blindness, is acceptable proof of incapacity.

[FR Doc. 87-22769 Filed 10-2-87; 8:45 am]  
BILLING CODE 4150-04-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 0

[Gen. Docket No. 87-387; FCC 87-292]

### Freedom of Information Reform Act of 1986; Fee Schedule and Administrative Procedures; Amending Freedom of Information Act

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The FCC proposes to amend its Freedom of Information Act (FOIA) regulations to incorporate recent changes to the FOIA regarding establishment of fees to be charged for search, review and duplication of documents. These proposed rules follow the guidelines established by the Office of Management and Budget.

**DATE:** Comments are due on or before November 9, 1987. Reply comments are due on or before November 24, 1987.

**ADDRESS:** Secretary's Office, Room 222, Federal Communications Commission, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Sharon Diskin or Lawrence S. Schaffner, 1919 M Street NW., Washington, DC (202) 632-6990.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's notice and comment in Gen. Docket No. 87-387, adopted September 10, 1987, and released September 9, 1987.

The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, Northwest, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor,

International Transcription Service, (202) 857-3800, 2100 M Street, Northwest, Suite 140, Washington, DC 20037.

### Summary of Notice of Proposed Rulemaking

1. The Federal Communications Commission proposes to amend its Freedom of Information Act (FOIA) regulations to incorporate the recent changes to the FOIA regarding establishment of fees to be charged for search, review and duplication of records in response to FOIA requests. The proposed rules follow the guidelines established by the Office of Management and Budget, (OMB).

2. The proposed rules would implement the statutory amendments contained in the Freedom of Information Reform Act (Reform Act) and the administrative procedures set forth in the OMB Guidelines. The most significant revision contained in the proposed rules is the establishment of a multi-tiered structure for the assessment of FOIA charges. The Reform Act establishes several categories of FOIA requesters with separate fee provisions applicable to each category. For example, whenever records are sought for "commercial use," agencies are permitted to charge not only for search and reproduction costs, but for the costs of reviewing documents for the purpose of applying FOIA exemptions. When educational, noncommercial scientific institutions or news media requesters seek records, they will be charged only for duplication costs, after receiving the first 100 pages free. All other non-commercial use requesters will receive the first 100 pages of documents free of copying charges and two hours of search without charge.

3. Further, Reform Act permits agencies to recover only the direct costs of search, duplication or review. The Commission has determined that the direct cost of duplicating is 17 cents per page. This charge is based on the most recent estimates of costs to the Commission. As under its existing rules, the Commission's charges for search and review will be based on the grade level of the employee performing the search plus an allowance for benefits. In addition, the proposed rules provide that requesters will have the option of obtaining routinely available information from the copy contractor rather than filing a FOIA request with the Commission. Materials obtained from the contractor will be available at the contract rate and reduced assessment of fees because of the category in which he or she falls may receive such a reduced assessment only

if the information request is filed with the Commission.

4. Other significant reform features include the following: (1) A provision stating that the Commission will not be authorized to require advance payment of a fee unless the requester's prior failure to pay a fee warrants such a deposit or the estimated cost of processing is \$250 or more; (2) a provision that fee waiver issues will be adjudicated in court proceedings according to a *de novo* standard of review; and (3) a general fee waiver standard which provides for waivers where disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Other noteworthy features contained in the OMB Guidelines and the proposed rules include provisions for charging for unsuccessful searches and for assessing interest for late payments.

5. The Commission is also taking this opportunity to add a new provision establishing that only those records within the Commission's possession and control as of the date a FOIA request is received are subject to the request. By this rule, we will establish a uniform benchmark for determining which documents should be considered in responding to a request.

6. Finally, the proposed rules update the charge for certification of documents. To cover the agency's administrative costs, including the time needed to verify that the document is a true copy of the original document in the Commission's record and to bind and seal the material, we are proposing to charge \$10 for each certification. Copies of certified documents, if requested, will be charged at the rate of 17 cents per copy. We do not, however, propose any charge for the additional search time that may be required to find the original document in the Commission's records. The fee for certification must be paid before the certified document is released by the Commission.

7. This is a non-restricted notice and comment rule making proceeding. See § 1.1231 of the Commission's rules, 47 CFR 1.1231, for rules governing permissible *ex parte* contacts.

8. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), it is hereby certified that the proposed amendment will not, if promulgated, have a significant economic impact on a substantial number of small entities. The proposed amendments are not designed to alter the fees charged small entities for document production. To the extent



small entities may be among the categories of information requesters specified in the fee provisions, the rules will affect only small entities who file FOIA requests.

9. In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), any reporting and recordkeeping provisions that are included in the rules will be submitted for approval to the Office of Management and Budget (OMB).

10. Under the procedures set forth in § 1.415 of the Commission's Rules, 47 CFR 1.415, interested persons may file comments or before November 24, 1987. As reflected above, this proceeding on or before November 9, 1987 and reply comments on is being conducted on an expedited basis.

11. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

12. The proposed amendments to the Commission's Rules are issued pursuant to the authority contained in section 4(i) of the Communications Act, 47 U.S.C. 154(i) and section 552(a)(4)(A)(i) of the Freedom of Information Act, as amended, 5 U.S.C. 552(a)(4)(A)(i).

Federal Communications Commission.

William J. Tricarico,  
Secretary.

#### List of Subjects in 47 CFR Part 0

Commission organization.

[FR Doc. 87-22684 Filed 10-2-87; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 33

#### Refuge-Specific Fishing Regulations

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Fish and Wildlife Service (Service) would amend certain regulations in 50 CFR Part 33 that pertain to fishing on individual national wildlife refuges (NWR). Refuge fishing programs are reviewed annually to determine whether the regulations governing fishing on individual refuges should be modified. Changing environmental conditions, State and Federal regulations and other factors affecting fish populations and habitats may warrant such amendments. The modifications would ensure the continued compatibility of fishing with

the purposes for which the individual refuges involved were established, and to the extent practical, make refuge fishing programs consistent with State regulations.

**DATE:** Comments must be received on or before November 4, 1987.

**ADDRESS:** Send comments to: Assistant Director, Refuges and Wildlife, Fish and Wildlife Service, Room 2348, 18th and C Streets, NW., Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Nancy A. Marx, Division of Refuges, Fish and Wildlife Service, 18th and C Streets, NW., Washington, DC 20240; Telephone 202-343-3922.

**SUPPLEMENTARY INFORMATION:** 50 CFR Part 33 contains the provisions that govern fishing on NWRs. Fishing is regulated on refuges to (1) ensure compatibility with refuge purposes, (2) properly manage the fishery resource and (3) protect other refuge values. On many refuges, the Service policy of adopting State fishing regulations is an adequate way of meeting these objectives. On other refuges it is necessary to supplement State regulations with refuge-specific fishing regulations which will ensure that the Service meets its management responsibilities, as outlined under the section entitled "Conformance with Statutory and Regulatory Authorities." Refuge-specific fishing regulations are issued only after the final publication of the opening of a wildlife refuge to fishing. These regulations may list the seasons, methods of taking fish, descriptions of open areas and other provisions. The Service previously issued refuge-specific fishing regulations in 50 CFR Part 33.

This proposed rule would amend and supplement certain refuge-specific regulations in 50 CFR Part 33, §§ 33.5 through 33.55, which pertain to fishing on individual refuges in their respective alphabetically listed State.

The policy of the Department of the Interior (Department) is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. It is, therefore, the purpose of this proposed rulemaking to seek public input regarding the proposed amendments to refuge-specific fishing regulations. Accordingly, interested persons may submit written comments, suggestions or objections concerning this proposal to the Assistant Director, Refuges and Wildlife (address above), by the end of the comment period. All substantive comments will be considered by the Department prior to issuance of a final rule.

#### Conformance With Statutory and Regulatory Authorities

The National Wildlife Refuge System Administration Act (NWRSA) of 1966, as amended (16 U.S.C. 668dd), and the Refuge Recreation Act of 1962 (16 U.S.C. 460k) govern the administration and the public use of NWRs. Specifically, section 4(d)(1)(A) of the Refuge System Administration Act authorizes the Secretary of the Interior (Secretary) under such regulations as he may prescribe, to permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations and access when he determines that such uses are compatible with the major purposes for which such areas were established.

The Refuge Recreation Act authorizes the Secretary to administer the refuge areas within the National Wildlife Refuge System for public recreation as an appropriate incidental or secondary use only to the extent that it is practicable and not inconsistent with the primary objectives for which the area was established. The Refuge Recreation Act also authorizes the Secretary to issue regulations to carry out the purposes of the Act.

Fishing plans are developed for each fishing program on a refuge prior to the opening of the refuge to fishing. In many cases, refuge-specific fishing regulations are included as a part of the fishing plans to ensure the compatibility of the fishing programs with the purposes for which the refuge was established. Compliance with the NWRSA and Refuge Recreation Act is ensured when the fishing plans are developed and the determinations required by these Acts are made prior to the addition of the refuge to the list of areas open to fishing in 50 CFR. Continued compliance is ensured by annual review of fishing programs and regulations.

#### Economic Effect

Executive Order 12291 requires the preparation of regulatory impact analyses for major rules. A major rule is one likely to result in an annual effect on the economy of \$100 million or more; a major increase in cost of prices for consumers; individual industries, government agencies or geographic regions; or significant adverse effects on the ability of United States-based enterprises to compete with foreign-based enterprises. The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) further requires the preparation of flexibility analyses for rules that will



have a significant effect on a substantial number of small entities, which include small businesses, organizations or governmental jurisdictions.

The proposed amendments to the codified refuge-specific fishing regulations would make relatively minor adjustments to existing fishing programs. The regulations are not expected to have any gross economic effect and will not cause an increase in costs or prices for consumers, individual industries, Federal, State or local governments, agencies or geographic regions. The benefits accruing to the public are expected to exceed the costs of administering this rule. Accordingly, the Department has determined that this rule is not a "major rule" within the meaning of Executive Order 12291 and will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

#### Paperwork Reduction Act

The Service has received approval from the Office of Management and Budget (OMB) for the information collection requirements of these regulations pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). These requirements are presently approved by OMB under #1018-0014 Economic and Public Use Permits. These regulations impose no new reporting or recordkeeping requirements that must be cleared by OMB.

#### Environmental Considerations

Compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(2)(C)) and the Endangered Species Act of 1973 (16 U.S.C. 1531 through 1543) is ensured when fishing plans are developed and the determinations required by these Acts are made prior to the addition of refuges to the list of areas open to sport fishing in 50 CFR. Refuge-specific fishing regulations are subject to a categorical exclusion from the NEPA process if they do not significantly alter the existing use of a particular NWR. The changes proposed in this rulemaking would not significantly alter the existing uses of the refuges involved.

Information regarding the conditions that apply to individual refuge fishing programs, any restrictions related to public use on the refuge and a map of the refuge are available at refuge headquarters. This information can also be obtained from the regional offices of the Service at the addresses listed below.

Region 1—California, Hawaii, Idaho, Oregon and Washington:

Assistant Regional Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, Lloyd 500 Building, Suite 1692, 500 Multnomah Street, Portland, Oregon 97232; Telephone (503) 231-6214.

Region 2—Arizona, New Mexico, Oklahoma and Texas:

Assistant Regional Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, Box 1306, Albuquerque, New Mexico 87103; Telephone (505) 766-2324.

Region 3—Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio and Wisconsin:

Assistant Regional Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, Federal Building, Fort Snelling, Twin Cities, Minnesota 55111; Telephone (612) 725-3507.

Region 4—Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Puerto Rico, Tennessee and the Virgin Islands:

Assistant Regional Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, Richard B. Russell Federal Building, 75 Spring Street SW, Atlanta, Georgia 30303; Telephone (404) 221-3538.

Region 5—Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia:

Assistant Regional Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, One Gateway Center, Suite 700, Newton Corner, Massachusetts 02158, Telephone (617) 965-9222.

Region 6—Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming:

Assistant Regional Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, Box 25486, Denver Federal Center, Denver, Colorado 80255; Telephone (303) 236-4608.

Region 7—Alaska:

Assistant Regional Director—Refuges and Wildlife, U.S. Fish and Wildlife Service, 1011 E. Tudor Rd., Anchorage, Alaska 99503; Telephone (907) 786-3542.

Nancy A. Marx, Division of Refuges, Fish and Wildlife Service, Washington, DC, is primary author of this proposed rulemaking document.

#### List of Subjects in 50 CFR Part 33

Fishing, National Wildlife Refuge System, Wildlife refuges.

#### PART 33—[AMENDED]

Accordingly, it is proposed to amend Part 33 of Chapter I of Title 50 of the *Code of Federal Regulations* as set forth below:

1. The authority citation for Part 33 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd and 715i.

2. Section 33.5 would be amended by revising (a)(i), (b) and (c)(2) as follows:

##### § 33.5 Alabama.

(a) *Bon Secour National Wildlife Refuge.* \* \* \*

(1) Fishing is permitted only from sunrise to sunset.

\* \* \*

(b) *Choctaw National Wildlife Refuge.* Fishing is permitted on designated areas of the refuge subject to the following condition: Fishing is permitted only from sunrise to sunset.

(c) *Eufaula National Wildlife Refuge.* \* \* \*

(2) Fishing, including bowfishing, is permitted from March 1 through October 31 only from sunrise to sunset on all refuge impoundments and waters other than the Walter F. George Reservoir.

\* \* \*

2. Section 33.8 would be amended by revising (a)(1), (b) introductory text and (d)(1); adding (d)(5) and (6) and revising (e)(1) as follows:

##### § 33.8 Arkansas.

(a) *Big Lake National Wildlife Refuge.* \* \* \*

(1) Fishing is permitted from March 1 through October 31 only from sunrise to sunset with the following exceptions: Bank fishing is permitted at any time in the area around Floodway Dam south of the Highway 18 bridge, and fishing only for sunrise to sunset from nonmotorized boats and boats with electric motors is permitted in the Sand Slough-Mud Slough Area from November 1 through the end of February.

\* \* \*

(b) *Felsenthal National Wildlife Refuge.* Fishing, frogging and the taking of turtles and crawfish are permitted on designated areas of the refuge subject to the following conditions:

\* \* \*

(d) *Wapanocca National Wildlife Refuge.* \* \* \*



(1) Fishing is permitted from March 15 through September 30 only from sunrise to sunset.

(5) Big Creek and Ditch 8 are closed to fishing.

(6) Length limits for largemouth bass are required as posted.

(3) *White River National Wildlife Refuge*.

(1) Fishing is permitted from March 1 through October 31 except as posted and as follows: Fishing is permitted year-round in LaGrue, Essex, Prairie, and Brooks Bayous, Big Island Chute, Moon Lake next to Highway 1, the portion of Indiana Bay south of Highway 1, and those borrow ditches located adjacent to the west bank of that portion of the White River Levee north of the Arkansas Power and Light Company powerline right-of-way.

3. Section 33.13 would be amended by revising (a)(1); redesignating (b) through (l) as (c) through (m); adding (b); revising newly redesignated (c)(1), (d), (f)(1), (g)(1), (h)(1) and (i)(1); adding (i)(4); revising newly redesignated (l) introductory text and (l)(1); adding (l)(3); revising newly redesignated (m)(1) and adding (m)(4) as follows:

#### § 33.13 Florida.

(a) *Cedar Keys National Wildlife Refuge*.

(1) Fishing is permitted only from sunrise to sunset.

(b) *Chassahowitzka National Wildlife Refuge*. Fishing is permitted on designated areas of the refuge subject to the following condition: Fishing is permitted year-round, except in a designated sanctuary that is closed to all public entry from October 15 to February 15.

(c) *Egmont Key National Wildlife Refuge*.

(1) Fishing is permitted only from sunrise to sunset.

(d) *Hobe Sound National Wildlife Refuge*. Fishing is permitted on designated areas of the refuge subject to the following condition: Fishing is permitted year-round only from sunrise to sunset.

(f) *Lake Woodruff National Wildlife Refuge*.

(1) Fishing is permitted only from sunrise to sunset.

(g) *Lower Suwannee National Wildlife Refuge*.

(1) Bank fishing is permitted in interior refuge creeks, borrow pits and canals

from March 15 to September 30 only from sunrise to sunset.

(h) *Loxahatchee National Wildlife Refuge*.

(1) Fishing is permitted only from sunrise to sunset on all areas of the refuge except the management impoundments and those areas marked by signs as closed to public entry or fishing.

(i) *Merritt Island National Wildlife Refuge*.

(1) Night fishing is permitted from a boat only. A permit is required.

(4) Air thrust boats are prohibited.

(1) *St. Marks National Wildlife Refuge*. Fishing and crabbing are permitted on designated areas of the refuge subject to the following conditions:

(1) Freshwater fishing and crabbing are permitted only from sunrise to sunset.

(3) Launching of commercial or sport net boats at the saltwater boat ramp on C.R. 59 is prohibited.

(m) *St. Vincent National Wildlife Refuge*.

(1) Fishing is permitted only from sunrise to sunset.

(4) Fishing seasons and largemouth bass length limits are as posted.

4. Section 33.14 would be amended by revising (a)(1), (d)(2), (f)(1), (h)(2) and (i)(3) as follows:

#### § 33.14 Georgia.

(a) *Banks Lake National Wildlife Refuge*.

(1) Fishing is permitted year-round only from sunrise to sunset.

(d) *Harris Neck National Wildlife Refuge*.

(2) Bank fishing into estuarine waters is permitted only from sunrise to sunset.

(f) *Piedmont National Wildlife Refuge*.

(1) Fishing is permitted from May 1 through September 30 only from sunrise to sunset.

(h) *Wassaw National Wildlife Refuge*.

(2) Bank fishing into estuarine waters is permitted only from sunrise to sunset.

(i) *Wolf Island National Wildlife Refuge*.

(3) Bank fishing into estuarine waters is permitted only from sunrise to sunset.

5. Section 33.19 would be amended by revising (a)(7) and removing (a)(8) as follows:

#### § 33.19 Iowa.

(a) *De Soto National Wildlife Refuge*.

(7) Minimum length and creel limits are required as posted.

6. Section 33.22 would be amended by revising (b)(1) and (2), (d)(1), (e)(1), and (f)(7) as follows:

#### § 33.22 Louisiana.

(b) *Catahoula National Wildlife Refuge*.

(1) Fishing is permitted in Cowpen Bayou year-round only from sunrise to sunset.

(2) Fishing is permitted in the Duck Lake impoundment and discharge waters from March 1 through October 31 only from sunrise to sunset.

(d) *Delta National Wildlife Refuge*.

(1) Fishing, shrimping and crabbing are permitted only from sunrise to sunset.

(e) *Lacassine National Wildlife Refuge*.

(1) Fishing is permitted from March 1 through October 15 only from sunrise to sunset.

(f) *Sabine National Wildlife Refuge*.

(7) Daily shrimp (heads on) take and/or possession limit is 5 gallons or 20 quarts per vehicle during the State inside water shrimp season; and 5 quarts take and/or possession limit per vehicle during the rest of the year.

7. Section 33.25 would be amended by revising (a)(1) as follows:

#### § 33.25 Massachusetts.

(a) *Great Meadows National Wildlife Refuge*.

(1) Fishing is permitted along the main channel of the Sudbury River, Concord River and along designated banks of Heard Pond with the following exception: Fishing is not permitted within refuge impoundments.

8. Section 33.27 would be amended by revising (a)(1) as follows:

#### § 33.27 Minnesota.

(a) *Big Stone National Wildlife Refuge*.



(1) Nonmotorized boats or boats with electric motors are permitted in the Minnesota River channel only.

#### § 33.28 [Amended]

9. Section 33.28 would be amended by revising (b) as follows:

(b) *Noxubee National Wildlife Refuge*. Fishing is permitted on designated areas of the refuge subject to the following conditions:

(1) Fishing is permitted from March 1 through October 31, except for the Noxubee River and the borrow pits along Highway 25 which are open year-round.

(2) Fishing is permitted only from sunrise to sunset. Boats may not be left on the refuge overnight.

(3) Limb lines, snag lines and hand grappling are prohibited in the Bluff and Loakfoma Lakes. Only nongame fish may be taken with a bow.

(4) All trotline material must be cotton twine. One trotline per person, and no more than two per boat.

(5) The length limit for largemouth bass taken from Loakfoma and Ross Branch Lakes is less than 12 inches and more than 15 inches. Largemouth bass from 12 inches to 15 inches must be released unharmed.

(6) Boats are restricted to no-wake speeds on all refuge waters.

10. Section 33.37 would be amended by redesignating (a) and (b) as (b) and (c), and (c) as (e); adding (a) and (d) and revising newly redesignated (b)(1), (c)(1) and (3) and (e)(2) as follows:

#### § 33.37 North Carolina.

(a) *Alligator River National Wildlife Refuge*. Fishing and frogging are permitted on designated areas of the refuge subject to the following conditions:

(1) Fishing is permitted year-round only from sunrise to sunset.

(2) Only the use of pole and line, rod and reel or cast net is permitted.

(3) A permit is required for night fishing.

(4) Frogs may be taken by the use of frog gigs only. A permit is required.

(b) *MacKay Island National Wildlife Refuge*.

(1) Fishing is permitted only from sunrise to sunset from March 15 through October 15 with the exception that bank fishing is permitted in Corey's Ditch and the canal adjacent to the Knotts Island Causeway year-round.

(c) *Mattamuskeet National Wildlife Refuge*.

(1) Fishing and crabbing are permitted from March 1 through November 1 from one-half hour before sunrise to one-half hour after sunset or as posted.

(3) Herring (alewife) dipping is permitted from March 1 to May 15 only from sunrise to sunset or as posted.

(d) *Pea Island National Wildlife Refuge*. Fishing and crabbing are permitted on designated areas of the refuge subject to the following condition: Fishing and crabbing are prohibited in North Pond, South Pond and Newfield impoundments.

(e) *Pee Dee National Wildlife Refuge*.

(2) Fishing is permitted only from sunrise to sunset.

#### § 33.41 [Amended]

(11.) Section 33.41 would be amended by revising (g)(1) as follows:

(g) *Umatilla National Wildlife Refuge*.

(1) Fishing is permitted on refuge impoundments and ponds from February 1 through September 30. Other refuge waters (Columbia River and its backwaters) are open in accordance with State regulations.

12. Section 33.44 would be amended by revising (a)(1) and (d)(1) as follows:

#### § 33.44 South Carolina.

(a) *Cape Romain National Wildlife Refuge*.

(1) Fishing is permitted from March 1 through September 30 only from sunrise to sunset.

(d) *Santee National Wildlife Refuge*.

(1) Fishing is permitted on inland ponds only from sunrise to sunset or as posted.

13. Section 33.46 would be amended by revising (a)(1), (b)(1), (c)(1) and (e)(2) and adding (a)(7) as follows:

#### § 33.46 Tennessee.

(a) *Cross Creeks National Wildlife Refuge*.

(1) Fishing is permitted in refuge pools and reservoirs from March 1 through October 31 only from sunrise to sunset.

(7) The length limit for largemouth bass taken from Elk and South Cross Creeks reservoirs is less than 12 inches and more than 15 inches. Largemouth bass from 12 inches to 15 inches must be released unharmed.

(b) *Hatchie National Wildlife Refuge*.

(1) Fishing is permitted only from sunrise to sunset.

(c) *Lake Isom National Wildlife Refuge*.

(1) Fishing is permitted from March 15 through October 15 only from sunrise to sunset.

(e) *Reelfoot National Wildlife Refuge*.

(2) Fishing is permitted only from sunrise to sunset.

14. Section 33.51 would be amended by revising (a)(1) and (2) and adding (a)(3) and (4) as follows:

#### § 33.51 Washington.

(a) *Columbia National Wildlife Refuge*.

(1) Nonmotorized boats and boats with electric motors are permitted on Upper and Lower Hampton, Hutchinson, Royal and Shiner Lakes.

(2) Motorized and nonmotorized boats are permitted on all other refuge waters open to fishing except in March Units I and II.

(3) Marsh Units I and II are restricted to shoreline fishing only.

(4) The taking of bullfrogs is prohibited.

15. Section 33.53 would be amended by redesignating (c) as (d) and adding (c) as follows:

#### § 33.53 Wisconsin.

(c) *Trempealeau National Wildlife Refuge*. Fishing is permitted on designated areas of the refuge subject to the following conditions:

(1) Only hand-powered craft and boats using electric trolling motors are permitted.

(2) Fishing from boats is not permitted from October 10 through November 30.

(3) Ice fishing is permitted only when ice conditions are safe.

16. Section 33.55 would be amended by revising (a)(1) and (2) as follows:



**§ 33.55 Pacific Islands Territory.**

(a) *Johnston Atoll National Wildlife Refuge.* \* \* \*

(1) Lobsters of 3¼ inch carapace length or more may be taken from the lagoon area from September 1 through May 31, but not by spearing; no female lobsters bearing eggs may be taken at any time.

(2) The use of nets, except throw nets, is prohibited.

\* \* \* \* \*

Date: September 3, 1987.

**Susan Recce,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 87-22767 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-55-M



# Notices

Federal Register

Vol. 52, No. 192

Monday, October 5, 1987

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Agricultural Stabilization and Conservation Service

#### National Conservation Review Group; Meeting

**AGENCY:** Agricultural Stabilization and Conservation Service (ASCS), USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The National Conservation Review Group will meet to consider recommendations from State and County Conservation Review Groups with respect to the operational features of the Agricultural Conservation Program (ACP), the Emergency Conservation Program (ECP), and the Forestry Incentives Program (FIP). Comments and suggestions will be received from the public concerning these conservation and environmental programs administered by the Agricultural Stabilization and Conservation Service (ASCS).

**DATE:** Meeting Date: October 30, 1987.

**DATES:** Meeting Location: Room 4960 South Building, U.S. Department of Agriculture, 14th and Independence Avenue, SW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Chief, Conservation Programs and Automation Branch, Conservation and Environmental Protection Division, ASCS, U.S. Department of Agriculture, Room 4723, South Building, Washington, DC 20013, 202-447-7333.

**SUPPLEMENTARY INFORMATION:** The National Conservation Review Group meeting is scheduled to be held from 9:00 a.m. to 12:00 noon on October 30, 1987, in Room 4960, South Building, U.S. Department of Agriculture, Washington, DC. Meeting sessions will be open to the public. The agenda will include consideration of State and County Review Group recommendations for changes in the administrative procedures and policy guidelines of the ACP, ECP, and FIP. An opportunity will

be provided for the public to present comments at the meeting on these conservation and environmental programs administered by ASCS. Because of time constraints and anticipated participation from interested individuals and groups, comments will be limited to not more than 5 minutes. Individuals or groups interested in making recommendations may also make them in writing and submit them to Chief, Conservation Programs and Automation Branch, Conservation and Environmental Protection Division, ASCS, U.S. Department of Agriculture, Room 4723-S, Washington, DC 20013. The meeting may also include discussion of current procedures, criteria, and guidelines relevant to the implementation of these programs.

Because of the limitations of space available, persons desiring to attend the meeting should call Mr. Vincent Grimes (202) 447-7333 to make reservations.

Signed at Washington, DC, on September 29, 1987.

Milton Hertz,

Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 87-22952 Filed 10-2-87; 8:45 am]

BILLING CODE 3410-05-M

## Commodity Credit Corporation

### Price Support Levels; 1987 Crop Soybeans

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Notice of determinations with respect to 1987 Crop of Soybeans.

**SUMMARY:** The purpose of this notice is to set forth the final announcement that the level of price support for the 1987 crop of soybean is \$4.77 per bushel. This announcement is made pursuant to section 201(i) of the Agricultural Act of 1949, as amended (the "1949 Act"). In accordance with section 1009 of the Food Security Act of 1985, as amended, any determinations with respect to implementation of cost reduction options will be made at a later date.

**EFFECTIVE DATE:** September 24, 1987.

**FOR FURTHER INFORMATION CONTACT:** Orville I. Overboe, Agricultural Economist, Commodity Analysis Division, ASCS-USDA, P.O. Box 2415, Washington, DC 20013, Telephone (202) 447-4417.

**SUPPLEMENTARY INFORMATION:** This notice has been reviewed under USDA

procedures established in accordance with Executive Order 12291 and Departmental Regulation No. 1512-1 and has been designated as "major". It has been determined that these program provisions will result in an annual effect on the economy of \$100 million or more.

The title and number of the federal assistance program to which this notice applies are: Title—Commodity Loans and Purchases; Number—10.051 as found in the Catalog of Federal Domestic Assistance.

Section 1017 of the Food Security Act of 1985 provides that the Secretary of Agriculture shall determine the rate of loans, payments and purchases under a program established under the Agricultural Act of 1949 ("the 1949 Act") for any of the 1986 through 1990 crops without regard to the requirements for notice and public participation. Accordingly, public comments were not requested with respect to the level of price support for the 1987 crop of soybeans.

It has been determined that the Regulatory Flexibility Act is not applicable to this notice since the Commodity Credit Corporation is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this notice. A final impact analysis has been prepared and is available from the above named individual.

Section 201(i)(1)(A) of the 1949 Act provides that the price of soybeans for each of the 1986 through 1990 marketing years shall be supported through loans and purchases. Section 201(i)(1)(B) provides that the support price for the 1986 and 1987 crops of soybeans shall be \$5.02 per bushel. However, if the Secretary of Agriculture determines in accordance with section 201(i)(2) that the level of loans or purchases determined for a marketing year would discourage the exportation of soybeans and cause excessive stocks of soybeans in the United States, the Secretary may reduce the loan and purchase level for soybeans by the amount the Secretary determines necessary to maintain domestic and export markets for soybeans, except that the price support level cannot be reduced by more than 5 percent in any year nor below \$4.50 per bushel. Any reduction made in accordance with section 201(i)(2) in the loan and purchase level for soybeans shall not be considered in determining



the loan and purchase level for soybeans for subsequent years.

Section 201(i)(5) of the 1949 Act provides that the Secretary shall make a preliminary announcement of the level of price support for a crop of soybeans not earlier than 30 days prior to September 1, the beginning of the soybean marketing year, based upon the latest information and statistics then available. The Secretary must make a final announcement of such level as soon as full information and statistics are available. The final announcement of the level of price support must be made no later than October 1 of the marketing year to which the announcement is applicable and cannot be less than the level set forth in the preliminary announcement. The level announced in the preliminary announcement was \$4.77 per bushel.

Ending stocks of soybeans for the 1986-87 marketing year are expected to be approximately 480 million bushels, an amount considered to be excessive. Maintaining the price support level for the 1987 crop of soybeans at \$5.02 per bushel would likely result in ending stocks of approximately 507 million bushels for the 1987-88 marketing year since such a support level would discourage the exportation of soybeans and to a lesser degree, result in lower domestic use of soybeans. Based upon the 1987 estimated production of soybeans, a \$4.77 per bushel price support level would likely result in ending stocks of approximately 480 million bushels for the 1987-1988 marketing year.

As compared to a \$5.02 per bushel price support level, a \$4.77 per bushel price support level would increase the export of soybeans about 3 percent and also increase slightly the domestic use of soybeans. The price support level for the 1987 crop of corn has been established at \$1.82 per bushel. Establishing a 1987 soybean price support level of \$5.02 per bushel, with a \$1.82 per bushel price support level for corn, would result in an adverse distortion of the historical corn/soybean price relationship and result in an adverse impact on the use of soybeans. However, a 1987 soybean price support level of \$4.77 per bushel would better maintain this normal corn/soybean price relationship. Accordingly, the 1987-crop soybean price support level is \$4.77 per bushel, the same as the price support level for the 1986 crop.

Section 201(i)(3) of the 1949 Act provides that, if the Secretary determines that such action will assist in maintaining the competitive relationship of soybeans in domestic and export markets after taking into consideration the cost of producing soybeans, supply and demand

conditions, and world prices for soybeans, the Secretary may permit a producer to repay a loan for a crop at a level that is the lesser of (1) the announced loan level for such crop or (2) the prevailing world market price for soybeans, as determined by the Secretary. If the Secretary permits a producer to repay a loan as described above, the Secretary shall prescribe by regulation (1) a formula to define the prevailing world market price for soybeans and (2) a mechanism by which the Secretary shall announce periodically the prevailing world market price for soybeans.

Section 1009(a) of the Food Security Act of 1985 provides that whenever the Secretary determines that an action authorized by section 1009(c), (d) or (e) will reduce the total of the direct and indirect costs to the Federal Government of a commodity program administered by the Secretary without adversely affecting income to small and medium sized producers participating in such programs, the Secretary shall take such action with respect to that commodity program. These actions include: (1) The commercial purchases of commodities by the Secretary; (2) the settlement of nonrecourse loans at an amount less than the total of the principal loan amount and accumulated interest, but not less than the principal amount, if such action will result in: (A) Receipt of a portion rather than none of the accumulated interest; (B) avoidance of default of the loan; and (C) elimination of storage, handling and carrying charges on the forfeited loan collateral; and (3) the reopening of a production control or loan program established for a crop at any time prior to harvest of such crop for the purpose of accepting bids from producers for the conversion of acreage planted to a program crop to diverted acreage in return for in-kind payments if the Secretary has determined that: (1) Changes in domestic or world supply or demand conditions have substantially changed after announcement of the program for that crop and (2) without action to further adjust production, the Federal Government and producers will be faced with a burdensome and costly surplus. Such payments are not subject to the maximum payment limitation provision of section 1001 of the Food Security Act of 1985 but are limited to \$20,000 per year per producer for any one commodity.

Accordingly, the following determinations have been made.

#### **Determinations**

##### **A. Price Support Level**

The price support level for the 1987

crop of soybeans shall be \$4.77 per bushel.

##### **B. Marketing Loan**

A marketing loan will not be implemented with respect to the 1987 crop of soybeans.

##### **C. Cost Reduction Options**

The decision to implement any cost reduction option will be made at a later date.

(Sec. 201(i), Agricultural Act of 1949, as amended, 63 Stat. 1052, as amended (7 U.S.C. 1446(i)))

Signed at Washington, DC, on September 24, 1987.

Richard E. Lying,  
Secretary.

[FR Doc. 87-22955 Filed 10-2-87; 8:45 am]

BILLING CODE 3410-05-M

#### **Packers and Stockyards Administration**

##### **Certification of Central Filing System; New Hampshire**

The Statewide central filing system of New Hampshire is hereby certified, pursuant to section 1324 of the Food Security Act of 1985, on the basis of information submitted by Christopher Morgan, Assistant Secretary of State, for all farm products produced in that State.

This is issued pursuant to authority delegated by the Secretary of Agriculture.

Authority: Sec. 1324(c)(2), Pub. L. 99-198, 99 Stat. 1535, 7 U.S.C. 1631(c)(2); 7 CFR 2.17(e)(3), 2.56(a)(3), 51 FR 22795.

Dated: September 29, 1987.

B. H. (Bill) Jones,  
Administrator, Packers and Stockyards Administration.

[FR Doc. 87-22956 Filed 10-2-87; 8:45 am]

BILLING CODE 3410-KD-M

##### **Certification of Central Filing System; South Dakota**

The Statewide central filing system of South Dakota is hereby certified, pursuant to section 1324 of the Food Security Act of 1985, on the basis of information submitted by Thomas G. Leckey, Deputy Secretary of State, for all farm products produced in that State except timber to be cut.

This is issued pursuant to authority delegated by the Secretary of Agriculture.

Authority: Sec. 1324(c)(2), Pub. L. 99-198, 99 Stat. 1535, 7 U.S.C. 1631(c)(2); 7 CFR 2.17(e)(3), 2.56(a)(3), 51 FR 22795.

Dated: September 29, 1987.

B.H. (Bill) Jones,  
Administrator, Packers and Stockyards Administration.

[FR Doc. 87-22957 Filed 10-2-87; 8:45 am]

BILLING CODE 3410-KD-M



## DEPARTMENT OF COMMERCE

## International Trade Administration

[A-583-607]

## Fabric and Expanded Neoprene Laminate From Taiwan; Final Determination of Sales at Less Than Fair Value

**AGENCY:** International Trade Administration, Import Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** We have determined that fabric and expanded neoprene laminate (FENL) from Taiwan is being, or is likely to be, sold in the United States at less than fair value. The U.S. International Trade Commission (ITC) will determine, within 45 days of publication of this notice, whether these imports are materially injuring, or are threatening material injury to, a United States industry.

**EFFECTIVE DATE:** October 5, 1987.

**FOR FURTHER INFORMATION CONTACT:** Paul Tambakis or Charles Wilson, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377-4136 or 377-5288.

**SUPPLEMENTARY INFORMATION:****Final Determination**

We have determined that FENL from Taiwan is being, or is likely to be, sold in the United States at less than fair value, as provided in section 735(a) of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. 1673d(a)). The margin found for the company investigated is listed in the "Continuation of Suspension of Liquidation" section of this notice.

**Case History**

On May 8, 1987, we made an affirmative preliminary determination (52 FR 18258, May 14, 1987).

On May 18, 1987, we received a request from Shei Chung Hsin Co., Ltd. (SHEICO), sole respondent in this investigation, to extend the period for the final determination to no later than 135 days after publication of our "Preliminary Determination" notice in the *Federal Register*, in accordance with section 735(a)(2)(A) of the Act. We granted this request and postponed the final determination until no later than September 28, 1987 (52 FR 21339, June 5, 1987).

As required by the Act, we afforded interested parties an opportunity to submit oral and written comments. Since no requests were received for a public hearing, written comments on the issues arising in this investigation were

submitted between July 23 and August 31, 1987, in lieu of the public hearing.

**Scope of Investigation**

The product covered by this investigation is fabric and expanded neoprene laminate, as provided for in items 355.8100, 355.8210, 355.8220, 359.5000 and 359.6000 of the *Tariff Schedules of the United States Annotated* (TSUSA). This material is used primarily in the manufacture of wet suits and similar products for the scuba diving and recreational markets.

**Fair Value Comparisons**

We made comparisons on approximately 97 percent of the sales by SHEICO of FENL to the United States during the period of investigation (P.O.I.), July 1 through December 31, 1986. Because SHEICO accounted for over 70 percent of all sales of this merchandise from Taiwan, we limited our investigation to this company.

To determine whether sales of the subject merchandise in the United States were made at less than fair value, we compared the United States price with the foreign market value for the company under investigation using data provided in the responses.

**United States Price**

For certain sales by SHEICO, we based United States prices on exporter's sales price (ESP), in accordance with section 772(c) of the Act, since the sale to the first unrelated purchaser took place after importation into the United States. For those sales by SHEICO made directly to unrelated parties in the United States prior to importation, we based the United States price on purchase price in accordance with section 772(b) of the Act.

For sales which were made through a related sales agent in the United States to an unrelated purchaser prior to the date of importation, we used purchase price as the basis for determining United States price. For those sales, the Department determined that purchase price was the most appropriate indicator of United States price based on the following elements:

1. The merchandise in question was shipped directly from the manufacturer to the unrelated buyer, without being introduced into the inventory of the related selling agent;
2. This was the customary commercial channel for sales of this merchandise between the parties involved; and
3. The related selling agent located in the United States acted only as the processor of sale-related documentation and a communication link with the unrelated U.S. buyer.

Where all the above elements are met, we regard the routine selling functions of the exporter as having been merely

relocated geographically from the country of exportation to the United States, where the sales agent performs them. Whether these functions take place in the United States or aboard does not change the substance of the transactions or the functions themselves.

In instances where merchandise is ordinarily diverted into the related U.S. selling agent's inventory, we regard this factor as an important distinction because it is associated with a materially different type of selling activity than the mere facilitation of a transaction such as occurs on a direct shipment to an unrelated U.S. purchaser. In situations where the related party places the merchandise into inventory, it commonly incurs substantial storage and financial carrying costs and has added flexibility in his marketing. We also use the inventory test because it can be readily understood and applied by respondents who must respond to Department questionnaires in a short period of time. It is objective in nature, as the final destination of the goods can be established from normal commercial documents associated with the sale and verified with certainty.

We calculated purchase price and exporter's sale price based on the packed, f.o.b., c&i., c&f. duty unpaid, or c.i.f. duty paid prices to unrelated purchasers in the United States. We made deductions, where appropriate, for foreign inland freight, brokerage and handling charges, ocean freight, marine insurance, U.S. duty and U.S. inland freight. Where we used exporter's sales price, we made additional deductions for credit expenses, other U.S. selling expenses, and commissions. We made additions to both purchase price and exporter's sale price for duty drawback (i.e., import duties which were rebated, or not collected, by reason of the exportation of the merchandise to the United States) pursuant to section 772(d)(1)(B) of the Act.

**Foreign Market Value**

In accordance with section 773(a)(1)(B) of the Act, we calculated foreign market value based on sales for export to a country other than the United States (a "third country"), since SHEICO had insufficient home market sales of FENL. We calculated foreign market value based on the packed, c.i.f., f.o.b., c&f., or c&i., duty unpaid prices to unrelated purchasers in Australia. We selected Australia because it is the largest third country market and sales were made in similar quantities to that of the United States. We made deductions, where appropriate, for brokerage and handling, foreign inland freight, marine insurance, and ocean freight.



When we compared foreign market value to purchase price sales, we adjusted foreign market value for differences in credit expenses between the two markets, in accordance with § 353.15 of the Department's regulations (19 CFR 353.15). When we compared foreign market value with exporter's sales price, we deducted credit expenses in Australia from foreign market value. We also used indirect selling expenses in the Australian market to offset United States selling expenses and commissions, in accordance with § 353.15(c) of our regulations.

SHEICO's claim for warranty expenses in the Australian market was disallowed since this information could not be verified.

In order to adjust for differences in packing between the two markets, we deducted Australian packing costs from foreign market value and added U.S. packing costs.

We established separate categories of "such or similar" merchandise, pursuant to section 771(16) of the Act, on the basis of thickness, fabric type and foam type. Where there were no identical products in the Australian market with which to compare products sold to the United States, we made adjustments to similar merchandise to account for differences in the physical characteristics of the merchandise, in accordance with section 773(a)(4)(C) of the Act. These adjustments were based on differences in the costs of materials, labor and directly related factory overhead.

#### Interested Parties' Comments

*Comment 1:* Petitioner asserts that the Department should base its final determination exclusively on verified information and should reject information submitted after the verification, including the amended computer tape. Petitioner also urges the Department to assign zero sales prices to the six unreported U.S. sales found during verification.

Respondent disagrees with petitioner's suggested that the Department should reject the amended computer tape submitted by SHEICO since all data in the amended tape have been verified. Respondent further contends that the tape was submitted in accordance with the Department's request that SHEICO amend its sales listing. Respondent also explains that the six sales reported at verification were not, as petitioner suggests, intentionally omitted from SHEICO's original response. Therefore, no adverse action should be taken against SHEICO with respect to these sales.

*DOC Position:* We agree with petitioner that the final determination should be based exclusively on verified

information. We have used information contained in SHEICO'S amended computer tape since it was verified and was submitted in response to a request from the Department. Additionally, we have excluded in our fair value comparisons the six transactions unreported prior to verification for the reasons discussed in the Department's response to Comment 2.

*Comment 2:* Respondent urges the Department not to consider in its calculations certain U.S. sales made to a customer who has yet to pay Go-Sport, SHEICO's U.S. subsidiary. Respondent claims that these sales were not made in the ordinary course of trade and, because payment for the goods was never made, that a basic component of the sales transaction has not yet taken place. Respondent also contends that if these transactions are not deferred until an annual review, it would punish respondent unfairly with dumping duties simply because it is involved in litigation to recoup all monies owed, plus interest and punitive damages.

Respondent further argues that if the Department decides to use these transactions for the final determination, then the entire one-year period of non-payment should not be considered a credit expense since Go-Sport has no control over the payment time. Instead, respondent claims that credit expenses should be imputed based on the terms of each invoice. Respondent also urges the Department to impute indirect selling expenses based on the "bad debt" from the date on which payment was due on each invoice to the date of the final determination in this investigation.

*DOC Position:* We agree with respondent that all sales where the customer has yet to pay respondent's U.S. subsidiary should not be included in our fair value comparisons. This includes the six transactions unreported prior to verification. We have not included these sales because we were not able to calculate an accurate credit adjustment for them at this time. Moreover, they comprise less than one percent of the total value of FENL sold to the United States during the P.O.I. and the unusual circumstances surrounding these sales indicate that they are not representative of the respondent's selling practices in the U.S. market.

*Comment 3:* Petitioner claims that the Department should either correct errors found at verification on the reported credit expenses of Go-Sport on exporter's sales price transactions or apply the highest verified credit expense to those U.S. sales where respondent understated its credit costs.

Respondent, however, claims that Go-Sport did not understate certain credit expenses, as claimed by petitioner.

Respondent explains that the credit expenses associated with those sales where the customer never paid were intentionally left blank because of SHEICO's argument that credit expenses could not be calculated on these sales. Therefore, respondent states that use of best information available to calculate credit expenses on these sales is inappropriate.

*DOC Position:* We agree with petitioner that these errors should be corrected for the final determination, and the Department has done so. However, the Department disagrees with petitioner's contention that it should apply, as best information otherwise available, the highest verified credit expense where errors were found since most of these discrepancies occurred on sales which we excluded from our final calculations as described above. Errors found on other U.S. sales were not of the type or magnitude that would cause the Department to use best information available.

*Comment 4:* Petitioner claims that brokerage and handling expenses and certain claims related to U.S. inland freight charges on exporter's sales price transactions could not be verified. Consequently, petitioner states that the Department should adjust U.S. prices.

Respondent counters that, contrary to petitioner's assertions, brokerage and handling on the Go-Sport sales was verified by the Department, and should, therefore, be used in the final determination.

*DOC Position:* We disagree with petitioner that U.S. brokerage and handling could not be verified. Although some discrepancies were found, they were not of a magnitude to consider the use of best information available. As for U.S. inland freight, the reported amounts were verified, with the exception of two invoices. For these two sales, we have applied the highest verified U.S. inland freight charge as the best information otherwise available.

*Comment 5:* Petitioner asserts that the Department must disallow SHEICO's claim for warranty expenses in the Australian market since it could not be verified. Respondent, however, claims that warrant expenses were verified and should be allowed.

*DOC Position:* Since warranty expenses claimed on Australian sales was not verified to the satisfaction of the Department, we have disallowed warranty expenses on those Australian sales where SHEICO made this claim.

*Comment 6:* Petitioner urges the Department to base credit expenses for Australian and U.S. purchase price sales on verified data because respondent



inaccurately reported credit on some sales.

**DOC Position:** We agree and have based credit expenses claimed on Australian and U.S. purchase price sales on verified information. Credit expenses on most purchase price sales were under-reported because respondent made a mathematical error in failing to convert one component of the credit expense from U.S. dollars to New Taiwan dollars before totalling credit charges. This has been corrected in respondent's revised sales listing.

**Comment 7:** Petitioner contends that reported quantity discounts in both markets should be disallowed since this claim could not be verified.

**DOC Position:** We agree. No documentation could be produced at verification showing quantity discounts.

**Comment 8:** Petitioner claims that fumigation charges associated with Australian packing costs contain errors, which must be corrected in the final determination.

**DOC Position:** We agree that packing was understated on Australian sales because SHEICO made a mathematical error in calculating fumigation expenses. We have used the verified amounts in the final determination.

**Comment 9:** Petitioner claims that the verification report shows that duty drawback was overstated on four Australian sales. Therefore, these discrepancies should be corrected for the final determination.

**DOC Position:** We disagree. The calculations in the verification report only included drawback associated with the chemical blowing agent, and do not include the second component of drawback for nylon jersey. Therefore, we find no discrepancies in the reported drawback amounts when both components are added together. Respondent confirmed that the drawback amounts reported in the response are correct.

**Comment 10:** Respondent claims that virtually all of Go-Sport's operating expenses are not related to FENL sales and are not indirect selling expenses. Respondent argues that the indirect selling expenses properly allocable to Go-Sport's U.S. sales are only those indirect selling expenses incurred on the sales of FENL sheets, and should not include expenses related to wet suits and other accessories as well as those expenses not related to the selling function. Respondent further explains that the corporate officer's salary should be excluded to be consistent with the Department's policy in past investigations.

**DOC Response:** Since no assembly or

further manufacturing took place during the review period, we have considered all of Go-Sport's operating expenses, with the exception of those allocated to repair and maintenance, to be selling expenses. We agree with respondent that those selling expenses found at verification to be directly related to products other than FENL sheets should not be included as indirect selling expenses. These include show costs, advertising, commissions, sales promotion, travel expenses, and sample costs. We also disregarded bad debt expenses since these expenses relate to sales of products other than FENL.

The Department considered all remaining operating expenses of Go-Sport to be indirect selling expenses including portions of rent and supplies allocated to the selling, warehouse and office administration categories. We also allocated a portion of the president's salary to repair and maintenance, but included the remaining portion in the pool of indirect selling expenses. Total indirect selling expenses were allocated over sales of all products.

**Comment 11:** Respondent contends that the total amount claimed by SHEICO for indirect selling expenses on Australian sales was verified and should be used by the Department as an offset to U.S. selling expenses on exporter's sales price transactions. This includes rental on SHEICO's Lo Tung sales office and any expenses put on the books during the P.O.I., even if paid outside the P.O.I.

Petitioner counters by requesting that the Department correct discrepancies found at verification on Australian indirect selling expenses.

**DOC Position:** As petitioner suggests, Australian indirect selling expenses used in our final calculations are based on verified data. Furthermore, we agree with respondent that indirect selling expenses should include rent on the Lo Tung sales office and other indirect selling expenses accrued during the P.O.I., even if paid outside the P.O.I. since SHEICO uses the accrual method of accounting. The Department has, however, disallowed (1) the portion of the interest expense attributable to the claimed credit expenses on Australian and U.S. sales, because credit expenses have already been claimed as a circumstance-of-sale adjustment; and (2) expenses associated with a trip to Taiwan by the president of Go-Sport, because this did not relate to Australian sales.

#### Currency Conversion

For exporter's sales price

comparisons, we used the official exchange rate in effect on the date of sale, in accordance with section 773 (a)(1) of the Act, as amended by section 615 of the Trade and Tariff Act of 1984 (1984 Act). For purchase price comparisons, we used the exchange rate described in § 353.56(a)(1) of our regulations. All currency conversions were made at the rates certified by the Federal Reserve Bank.

#### Verification

As provided in section 776(a) of the Act, we verified all information relied upon in making this final determination. We used standard verification procedures, including examination of all relevant accounting records and original source documents provided by the respondent on relevant sales and financial records.

#### Continuation of Suspension of Liquidation

We are directing the U.S. Customs Service to continue to suspend liquidation of all entries of FENL from Taiwan that are entered, or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the **Federal Register**. The U.S. Customs Service shall continue to require a cash deposit or the posting of a bond on all entries equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeds the United States price, which is 0.80 percent of the entered value of the merchandise. The suspension of liquidation will remain in effect until further notice.

#### ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that such injury does exist, we will issue an antidumping duty order directing Customs officers to assess an antidumping duty on FENL from Taiwan entered, or withdrawn from warehouse, for consumption after the suspension of liquidation, equal to the amount by which the foreign market value exceeds the U.S. price.



This determination is published pursuant to section 735(d) of the Act (19 U.S.C. 1673d(d)).

September 28, 1987.

Lee W. Mercer,

Acting Assistant Secretary for Trade Administration.

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[C-614-701]

# **Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Certain Steel Wire Nails From New Zealand**

**AGENCY:** Import Administration, International Trade Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** We determine that benefits which constitute bounties or grants within the meaning of the countervailing duty law are being provided to manufacturers, producers or exporters in New Zealand of certain steel wire nails as described in the "Scope of Investigation" section of this notice. The estimated net bounty or grant and duty deposit rates are indicated in the "Suspension of Liquidation" section of this notice.

We are directing the U.S. Customs Service to continue suspension of liquidation of all entries of steel wire nails from New Zealand that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice, and to require a cash deposit on entries of these products in an amount equal to the duty deposit rates.

**EFFECTIVE DATE:** October 5, 1987.

**FOR FURTHER INFORMATION CONTACT:** Barbara Tillman or Mark Linscott, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 377-2438 (Tillman) or 377-8330 (Linscott).

## **SUPPLEMENTARY INFORMATION:**

### **Final Determination**

Based on our investigation, we determine that benefits which constitute bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (the Act), are being provided to manufacturers, producers or exporters in New Zealand of steel wire nails. For purposes of this investigation, the following programs are found to confer bounties or grants:

- Export Performance Taxation Incentive (EPTI).
- Sales Tax Exemptions or Refunds on Machinery and Equipment Used in the Production of Goods for Export.
- Export Suspensory Loan Scheme (ESLS).
- South Island Electricity Concession Scheme (SIECS).

Due to the termination of EPTI, the SIECS, and sales tax exemptions or refunds on machinery and equipment used in the production of goods for export, we have also determined that separate duty deposit rates are warranted, as set forth in the "Suspension of Liquidation" section of this notice.

### **Case History**

Since the last **Federal Register** publication pertaining to this investigation [the *Preliminary Affirmative Countervailing Duty Determination and Countervailing Duty Order: Certain Steel Wire Nails from New Zealand* (52 FR 27441, July 21, 1987)], the following events have occurred. We conducted verification in New Zealand from August 3 through 13, 1987, of the questionnaire responses of the Government of New Zealand, Consolidated Metal Industries (South Island) Ltd. (CMI), Auto Machine Manufacturing Co., Ltd. (AM), and Pearson, Knowles & Rylands Brothers (NZ) Ltd. (PKR). Supplementary responses from the Government of New Zealand were received on August 3 and 26, 1987. AM and CMI submitted supplementary responses on August 5 and 27, 1987, and September 11, 1987. A supplementary response from PKR was also received on September 11, 1987.

Respondents filed a brief on September 1, 1987, and comments on the verification reports on September 11, 1987. Petitioners filed no comments during the course of the investigation. Both petitioners and respondents waived their respective rights to a hearing in this case.

### **Scope of Investigation**

The products covered by this investigation are certain steel wire nails from New Zealand. These nails are: one-piece steel nails made of round wire, as currently provided for in *Tariff Schedules of the United States Annotated* item numbers 646.2500, 646.2610-90, and 646.3040; two-piece steel wire nails as currently provided for in item number 646.3200; and nails with steel wire shanks and lead heads, as currently provided for in item number 646.3600. These products are currently classifiable under *Harmonized System*

item numbers 7317.00.55, 7317.00.65, 7317.00.75 and 7616.10.10.

### **Analysis of Programs**

Throughout this notice, we refer to certain general principles applied to the facts of the current investigation. These principles are described in the "Subsidies Appendix" attached to the notice of *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order* (49 FR 18006, April 26, 1984).

For purposes of this final determination, the period for which we are measuring bounties or grants ("the review period") is calendar year 1986. Each company has recently modified its fiscal year, and, currently, each operates on the same fiscal year. However, the companies will not complete identical fiscal years until June 30, 1988. In accordance with our practice in such situations, we have chosen the most recently completed calendar year as our review period.

We have calculated a company-specific estimated net bounty or grant in the review period for purposes of this final determination for CMI because its estimated net bounty or grant is significantly different from the country-wide rate. As set forth in § 355.20(d) of our proposed regulations (50 FR 24207, June 10, 1985):

A significant differential is a difference of the greater of at least 10 percentage points, or 25 percent, from the weighted-average net subsidy calculated on a country-wide basis.

Since the differential between CMI's estimated net bounty or grant and the country-wide rate meets this requirement, we have calculated a separate estimated net bounty or grant under each program for CMI.

Due to the termination of EPTI, the SIECS, and sales tax exemptions or refunds on machinery and equipment used in the production of goods for export, all of which were verified, we also calculated separate duty deposit rates. PKR's and CMI's duty deposit rates are zero and, as such, are significantly different from the duty deposit rate for AM and all others.

Because the net bounty or grant calculated for all respondent companies during the review period was above *de minimis* and because the zero rate for PKR and CMI reflects program-wide changes which occurred after our review period but prior to our preliminary determination, we also determine that the zero duty deposit rate does not warrant a negative determination and exclusion from the order for those



companies. We are, therefore, requiring suspension of liquidation for all entries of the subject merchandise from PKR and CMI, but no collection of duties. Entries of the subject merchandise from AM and all others will be assessed at the duty deposit rate set forth in the "Suspension of Liquidation" section of this notice.

Based upon our analysis of the petition, the responses to our questionnaires, verification, and written comments filed by respondents, we determine the following:

#### *I. Programs Determined to Confer Bounties or Grants*

We determine that bounties or grants are being provided to manufacturers, producers or exporters in New Zealand of steel wire nails under the following programs:

**A. Export Performance Taxation Incentive (EPTI)** Exporters in New Zealand are entitled to receive a tax credit based on the f.o.b. value of qualifying goods exported under section 156A of the Income Tax Act of 1976, as amended. Credits are available as a deduction against income tax payable. If the tax credit exceeds the income tax payable, the remainder is paid to the taxpayer in cash. A credit cannot be carried forward and claimed on future tax returns.

The rate of the tax credit is dependent upon the government's predetermined value-added categories into which the exported products of a taxpayer fall. The amount of the tax credit is calculated by multiplying the rates corresponding to the value-added categories by the f.o.b. value of export sales. We verified that steel wire nails fall into value-added category B, for which the corresponding rate was 10.5 percent for fiscal years ending in 1985 and in earlier years, 5.25 percent for fiscal years ending in 1986, 2.625 percent for fiscal years ending in 1987, and zero thereafter. All three respondent companies claimed EPTI credits on their tax returns for the fiscal year ending in 1986.

Because only exporters are eligible for this program, we determine that it provides a bounty or grant to manufacturers, producers or exporters of steel wire nails within the meaning of the countervailing duty law.

In previous New Zealand cases, we looked to when tax returns were actually filed in order to assess when the EPTI tax benefits are received. Our rationale throughout has been that, for income tax programs, the benefits are received when the tax return is filed because only then "can a company truly

discern the ultimate benefit, and its effects, derived from any tax program." *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Steel Wire from New Zealand* (51 FR 31156, 31160, September 2, 1986).

After conducting a number of investigations during which we documented and verified the operation of EPTI, we now conclude that EPTI is different from most income tax programs in that it offers a definite percentage of the f.o.b. export sales value as a credit or cash rebate, received each year with no uncertainty as to eligibility, no need for complex tax accounting, and no dependence on ultimate tax liability.

We now believe that our standard lag methodology for income tax programs should not be used to measure the benefits under EPTI. Because a firm can precisely calculate an associated EPTI benefit for each export transaction at the moment the transaction is made and because this credit is not subject to alteration depending on their ultimate tax liability, we are able to calculate benefits on a credits-as-earned basis, looking to the percentage rate which applies to exports shipped during the review period.

To calculate the benefit under EPTI during the review period, we used the EPTI rates earned on exports made during this period. Because each company completed a fiscal year and began a new fiscal year during the review period, two EPTI rates applied during this period. We weight-averaged these rates based on associated export sales of steel wire nails to the United States and calculated a net bounty or grant of 3.87 percent *ad valorem* for CMI and 3.62 percent *ad valorem* for all others.

We verified in this investigation and in past investigations that the phase-out of EPTI benefits is proceeding as scheduled, as set forth in sections 156A(3A) through (3B) of the Income Tax Act. Each of the companies under investigation completed a fiscal year on June 30, 1987, which was prior to the publication of our preliminary determination. The EPTI rate earned on exports shipped by these companies after July 1, 1987, is zero. We have consistently taken into account program-wide changes which are implemented subsequent to our review period but prior to a preliminary determination, when the effect of the change is measurable and verifiable, by adjusting the duty deposit rate which applies to suspension of liquidation.

Because the termination affects all New Zealand exporters and is decreed by the Income Tax Act itself and

because we have verified by examining tax returns that the phase-out is proceeding as scheduled, we are satisfied that a program-wide change has been implemented and are setting the duty deposit rate at zero.

**B. Sales Tax Exemptions or Refunds on Machinery and Equipment Used in the Production of Goods for Export** Under Item 136 IV of the Sales Tax Exemption Order of 1979, enacted pursuant to Part VII of the Sales Tax Act of 1974, machinery used in the production of goods for export may be exempt from the ten percent sales tax. According to verified information, PKR received a sales tax exemption and CMI received a sales tax refund under Item 136 IV during the review period. Both related to the purchase of machines to be used in the production of nails.

Because the sales tax exemption received by PKR and the sales tax refund received by CMI during the review period under Item 136 IV were provided only if the machinery and equipment purchased were to be used for export production, we determine that this program provided a bounty or grant to manufacturers, producers or exporters of steel wire nails within the meaning of the countervailing duty law.

Therefore, to calculate the benefit for CMI, we divided the refund received by CMI during the review period by CMI's export sales of steel wire nails during the review period. On this basis, we calculate an estimated net bounty or grant of 41.03 percent *ad valorem* for CMI. To calculate the estimated net bounty or grant for all others, we divided the value of the exemption received by PKR during the review period by PKR's and AM's exports of steel wire nails during the review period. On this basis, we calculate an estimated net bounty or grant for all others of 1.20 percent *ad valorem*.

We verified that all legislation and regulations associated with the Sales Tax Act were repealed upon the imposition of the Goods and Services Tax (GST) on October 1, 1986. No applications for exemption could be accepted after this date. Due to delays in processing refund claims and further delays on the part of some companies in filing refund claims for machinery purchased prior to the date, the New Zealand Customs Department was still approving and disbursing outstanding claims after October 1, 1986. We verified that the New Zealand Customs Department continued to disburse sales tax refund checks through June 1987, but that no refunds have been disbursed since then. We also verified that the respondent companies received all of



the exemptions and refunds for which they were eligible no later than the end of 1986.

The GST which replaced the sales tax is a value-added tax regime. It is designed to impose the tax only on the final consumer of goods and services in the New Zealand economy. For this reason, we determine that no countervailable benefits are conferred under the GST.

Since the imposition of the GST on October 1, 1986, effectively repealed the Sales Tax Act and we verified that no exemptions or refunds have been received since 1986 by the companies under investigation, we consider this termination to be a program-wide change which occurred prior to the preliminary determination and are, therefore, calculating a duty deposit rate of zero.

#### C. Export Suspensory Loan Scheme (ESLS)

According to verified information, exporters may receive loans from the Development Finance Corporation (DFC) for the purchase of equipment used to expand production of exportable goods. If an exporter meets predetermined export sales targets for three consecutive years, its loans are converted to grants.

The term for a loan is five years.

We verified that AM received a loan in 1982, which was converted to a grant in 1986, a second loan in 1984, and a third loan in 1985. In addition, we verified that CMI and PKR have not received ESLS loans or grants.

Because the suspensory loans under this program are made available only for purchasing equipment used in producing export goods, we determine that this program provides a bounty or grant to manufacturers, producers or exporters of steel wire nails within the meaning of the countervailing duty law.

To calculate the benefit, we allocated the loan that was converted to a grant during the review period over 15 years, the average useful life of equipment used in the steel industry. Our preferred methodology is to allocate benefits over time using as our discount rate a weighted average of the firm's marginal costs of debt and equity for the year in which the grant was made. Because AM assumed no new long-term debt in 1986, when the first loan was converted to a grant, nor did it have any long-term debt outstanding during this period, other than export suspensory loans, we used as our discount factor New Zealand's national average cost of debt in 1986, as published in the bulletin of the Reserve Bank of New Zealand.

For the two loans which have not been converted, we compared the variable rates in force for each during the review period to New Zealand's national average short-term rate during the same period and expensed the differential in payment as a benefit received during the review period. We used the national average short-term rate in lieu of a national average or company-specific variable rate or a company-specific short-term rate because these preferred alternatives were unavailable for the review period. The interest rates on one of the loans were above the benchmark for the entire review period, therefore, we calculated no benefits associated with this loans.

The loan converted to a grant and the loan that was below the benchmark were tied specifically to nail production. Since CMI has received no ESLS loans or grants, the estimated net bounty or grant is zero for CMI. To calculate the country-wide rate, we added the benefit allocated to the review period for the grant to the benefit expensed to the review period for the loan and divided by AM's and RKR's export sales of steel wire nails during the review period. On this basis, we calculate an estimated net bounty or grant of 0.43 percent *ad valorem* for all others.

#### D. South Island Electricity Concession Scheme (SIECS)

Under the SIECS, established in 1979, the Department of Trade and Industry (DTI) offered select industrial users with operations on the South Island a 25 percent rebate on electricity consumption costs. The scheme's stated objectives were to stimulate growth and development in the South Island and to take into account the generous hydro-electricity supplies and the scarcity of natural gas deposits on the South Island. DTI limited rebate benefits to specified manufacturing industries, hotels and motels of five or more bedrooms and electricity-intensive agricultural activities.

From 1984 to March 31, 1986, DTI gradually phased-out the rebate scheme and implemented in its place a price differential in the bulk tariff rates (the supply rates charged to municipal distributors) between the South Island and North Island. In contrast to the SIECS, the new price differential was calculated based on government studies which documented that costs of electricity supply were lower on the South Island than on the North Island and that bulk tariff rates should reflect this differential. Moreover, while the SIECS was a direct rebate to designated industrial users, the price differential system applies to rates charged to

municipal distributors and not to end-users and is in no way limited to specific industries on the South Island.

Because the SIECS applied to only designated activities within a certain region, the South Island, we determine that it is limited to a specific enterprise or industry, or group thereof, within the meaning of the Act. Moreover, because the SIECS offered rebates that were not clearly related to cost differentials between specific end-users, we determine that this program provided goods or services on preferential terms within the meaning of the Act. To calculate the benefit under this program, we divided the amount of rebates received during the review period by CMI, the only company under investigation which is located on the South Island and, therefore, eligible under this program, by CMI's total sales during the review period. The estimated net bounty or grant is 0.11 percent *ad valorem* for CMI and zero for all others.

We verified that DTI formally terminated the SIECS in March 1986 and that it has no funds budgeted to the SIECS and has made no expenditures under the program in 1987. We also verified that CMI received its last electricity rebate in November 1986. Accordingly, we consider this termination to be a program-wide change and are, therefore, calculating a duty deposit rate of zero.

#### II. Program Determined Not to Confer Bounties or Grants

We determine that bounties or grants are not being provided to manufacturers, producers or exporters in New Zealand of steel wire nails under the following program:

##### Unit Rate Freight Rebate Scheme (URFRS)

During verification, we found that CMI received rebates under this program during the review period for goods shipped to the North Island. We verified that manufacturers or producers on the South Island are entitled to a nine to ten percent rebate of freight costs for goods shipped to the North Island, depending on whether the goods are shipped depot-to-depot or door-to-door. CMI is the only company under investigation located on the South Island, and is therefore the only such company eligible to receive benefits under this program.

We verified that the rebate applies only to goods sold for domestic consumption and consigned to points on the North Island north of Porirua and Upper Hutt. Goods intended for export are not eligible for the rebate.



Furthermore, we verified that all of CMI's exports are made directly from the South Island and are not shipped to the North Island and then exported from North Island ports. We therefore determine that rebates under this program do not confer a countervailable benefit on exports of steel wire nails to the United States.

### III. Programs Determined Not To Be Used

We determine, based on verified information, that manufacturers, producers or exporters in New Zealand of steel wire nails did not apply for, claim or receive benefits during the review period for exports of steel wire nails to the United States under the following programs which were listed in the *Initiation of Countervailing Duty Investigation: Certain Steel Wire Nails from New Zealand* (52 FR 18590, May 18, 1987).

- A. Export Marketing and Technical Assistance from the New Zealand Export-Import Corporation, DTI, the Building Research Association of New Zealand and the Standards Association of New Zealand
- B. Export Credits and Development Financing from the DFC
- C. Export Programme Grant Scheme (EPGS)/Export Programme Suspensory Loan Scheme (EPSLS)
- D. Preferential Treatment to Exporters in Granting Import Licenses under the Export Production Assistance Scheme (EPAS)
- E. Export Manufacturing Investment Allowance (EMIA)
- F. Supplementary Investment Allowances for Plants and Machinery under sections 121 and 121A of the Income Tax Act of 1976
- G. Research and Development Incentives under the Applied Technology Program (ATP)
- H. Export Market Development Taxation Incentive (EMDTI) Although EMDTI credits were claimed by PKR on the tax return for its fiscal year ending in 1986, filed during the review period, and by AM on the tax return for its fiscal year ending in 1986, filed in February 1987, we verified that these credits were not related, in any way, to exports to the United States.
- I. Regional Development Incentives other than SIECS and URFRS

We verified that all regional development incentives other than SIECS and URFRS were terminated as of April 21, 1986, and replaced by a single new program, the Regional Development Investigation Grants Scheme. We verified that none of the companies under investigation received benefits under this new scheme.

### Comments

*Comment 1:* Respondents argue that the Department should not calculate benefits under EPTI by using its tax lag methodology. They contend that the Department has been inconsistent in the application of the tax lag methodology, citing as examples the *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Low-Fuming Brazing Copper Rod and Wire from New Zealand* (50 FR 31638, August 5, 1985), in which the Department calculated the estimated net bounty or grant rate based on the applicable EPTI rate for the company's fiscal year ending July 31, 1984, which corresponded to the end of the review period, rather than on the tax return filed during this period, and the preliminary determination in the present investigation, in which it treated the tax return filed by AM in February 1987 as if it had been filed during the review period.

Respondents believe that this approach contradicts our determination in *Lime from Mexico. Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Lime from Mexico* (49 FR 35672, September 11, 1984). Respondents contend that EPTI is distinct from other countervailable tax programs because the benefits of EPTI can be assessed prior to the filing of a tax return. Respondents conclude that the Department should modify its review period to correspond to the companies' fiscal years ending June 30, 1987, and should calculate the estimated net bounty or grant as 2.625 percent, the EPTI rate that applied to exports made during this period, or alternatively, should exclude AM from the EPTI calculation if it continues with calendar year 1986 as the review period.

*DOC Position:* We agree that we should no longer use the tax lag methodology to calculate benefits under EPTI, and instead, should calculate benefits on a credits-as-earned basis. See section I.A. of this notice. However, we believe that our review period should remain calendar year 1986. Our usual practice is to choose the calendar year as our review period when the fiscal years of the respondent companies are not coincident. In this investigation, PKR's last completed fiscal year ran from April 1, 1986 to June 30, 1987, while AM and CMI operated on a July 1, 1986 to June 30, 1987 fiscal year. If we were to honor respondent's request, our review period would run to June 30, 1987, only a few weeks prior to our preliminary determination and verification. Each company's financial statements for this period are unaudited and, as such, are not completely reliable

for purposes of verification and the final determination.

*Comment 2:* Respondents argue that the estimated net bounty or grant should be calculated as 2.625 percent, the rate applied to exports over the fiscal year ending June 30, 1987, because the level of EPTI is known in advance of the filing of a company's tax return. They argue further that the Department should consider the phase-out of EPTI as a program-wide change and should find that EPTI has been terminated as of July 1, 1987, for AM, CMI and PKR. Respondents identify 2.625 percent as the applicable EPTI rate for the fiscal year ending June 30, 1988 (although we verified that the EPTI rate earned for each export shipment made after June 30, 1987, is zero), and request that the duty deposit rate be set at 2.625 percent.

*DOC Position:* As explained in section I.A. of the notice, because our review period remains calendar year 1986, we have calculated the net bounty or grant under EPTI by weight-averaging 5.25 and 2.625 percent, the rates at which each company earned credits during the review period. We agree that we should consider the phase-out of EPTI as a program-wide change and have set the duty deposit rate at zero to reflect termination of this program, which was effective before our preliminary determination and was verified.

*Comment 3:* Respondents argue that benefits arising from sales tax exemptions or refunds should be excluded from the duty deposit rate, as the sales tax legislation under which these exemptions or refunds were granted was repealed with the imposition of the GST Act on October 1, 1986.

*DOC Position:* We agree. Because the sales tax legislation under which refunds or exemptions were granted was repealed prior to our preliminary determination and no exemptions or refunds were provided under the program prior to our preliminary determination, we determine that no countervailable benefits are conferred under the GST (see section I.B. of this notice). Therefore, the duty deposit rate for benefits due to sales tax exemptions or refunds is zero.

*Comment 4:* Respondents argue that the sales tax refund received by CMI during the review period should not be countervailed because it related to the purchase of a nail machine in January 1985 and was only received during the review period due to excessive delays on the part of the New Zealand Customs Department.

*DOC Position:* We disagree. The Department has consistently ruled that



such delays have no bearing on the countervailability of a given benefit, unless the delay is mandated by the government. Due to the termination of the program, however, the duty deposit rate for benefits due to sales tax exemptions or refunds is zero (see DOC Position on Comment 3).

**Comment 5:** Respondents claim that the ESLS loan of NZ 30,000, which was converted to a grant during the review period, was used to purchase a nail packaging machine that is used entirely for the domestic market and is unable to pack nails in the pack sizes sold on the U.S. market. Respondents argue that the grant is not applicable to exports of nails and should therefore be found to be not countervailable.

**DOC Position:** We disagree. During verification, respondents were unable to provide us with evidence showing that this machine can never be used for packaging exports to the United States or that the package sizes for the U.S. market can never vary.

**Comment 6:** Respondents argue that AM's EMDTI claim on its 1986 tax return was directed at exports destined for the South Pacific and was unrelated to exports to the United States. They therefore conclude that EMDTI benefits should be excluded from the final determination.

**DOC Position:** We verified that, although both AM and PKR claimed and received EMDTI credits on their 1986 tax returns, these credits were specifically tied to non-U.S. exports. We have therefore determined that credits under EMDTI were not used with respect to exports to the United States.

#### Verification

In accordance with section 776(a) of the Act, we verified the information used in making our final determination. During verification we followed standard verification procedures, including meeting with government and company officials, inspecting documents and ledgers, tracing information in the response to source documents, accounting ledgers, and financial statements, and collecting additional information that we deemed necessary for making our final determination.

#### Suspension of Liquidation

We are directing the U.S. Customs Service to continue to suspend liquidation on all entries of steel wire nails from New Zealand which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the *Federal Register*. In accordance with section 706(a) of the Act (19 U.S.C. 1671e), we are directing the U.S. Customs Service to

require a cash deposit for each entry of steel wire nails according to the duty deposit rates listed below:

Manufacturer/producer/exporter	Estimated net bounty or grant	Duty deposit rate
Consolidated Metal Industries (South Island) Ltd.....	45.01 (percent)	zero
Pearson Knowles & Rylands Brothers (NZ) Ltd.....	5.25 (percent)	zero
All Others.....	5.25 (percent)	1.52 (percent)

This suspension will remain in effect until further notice.

This determination is published pursuant to section 705(d) of the Act (19 U.S.C. 1671d(d)).

September 28, 1987.

Lee W. Mercer,

Acting Assistant Secretary for Trade Administration.

[FR Doc. 87-22944 Filed 10-2-87; 8:45 am]

BILLING CODE 3510-DS-M

### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

#### Adjustment of Import Limits for Certain Cotton, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in the People's Republic of China

September 30, 1987.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, has issued the directive published below to the Commissioner of Customs to be effective on September 30, 1987. For further information contact Diana Solkoff, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, please refer to the Quota Status Reports which are posted on the bulletin boards of each Customs port or call (202) 566-6828. For information on embargoes and quota re-openings, please call (202) 377-3715.

#### Summary

In the letter published below, the Chairman of the Committee for the Implementation of Textile Agreements directs the Commissioner of Customs to increase the previously established restraint limits for man-made fiber, silk blend and other vegetable fiber textiles and textile products in Categories 634

and 847, produced or manufactured in the People's Republic of China and exported during 1987.

#### Background

A CITA directive dated December 23, 1986 (51 FR 47041) established import restraint limits for certain cotton, wool and man-made fiber textile products, including Categories 331 and 634, produced or manufactured in the People's Republic of China and exported during the twelve-month period which began on January 1, 1987 and extends through December 31, 1987. A subsequent directive dated April 17, 1987 (52 FR 13115) established import limits for Category 659-S, among others, for the same twelve-month period. In addition, 1987 restraint limits were established for silk blend and other vegetable fiber textile products in Categories 847 and 831, in CITA directives dated June 26, 1987 and September 21, 1987, respectively (52 FR 24503 and 52 FR 35939).

Under the terms of the bilateral textile agreement of August 19, 1983, as amended, and the bilateral textile agreement, effected by exchange of letters dated September 11 and 14, 1987, and at the request of the Government of the People's Republic of China, the limits for Categories 331, 634, 659-S, 831 and 847 are being adjusted. The limit for Category 634 is being increased by application of swing and Categories 331 and 659-S are being reduced to account for the swing being applied. These reductions also include swing applied to Categories 434 and 645/646 in a separate directive. Category 847 is being increased by application of swing and Category 831 is being reduced to account for such swing.

Merchandise shipped in Category 634, amounting to 13,000 dozen, which was exported in 1986, but charged to the 1987 limit for Category 634, will be deducted and charged back to the limit established for 1986.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the *Federal Register* on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983 (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), November 9, 1984 (49 FR 44782), July 14, 1986 (51 FR 25386), July 29, 1986 (51 FR 20768), and in Statistical Headnote 5, Schedule 3 of the *Tariff Schedules of the United States Annotated* (1987).

Adoption by the United States of the Harmonized Commodity Code (HCC)



may result in some changes in the categorization of textile products covered by this notice. Notice of any necessary adjustments to the limits affected by adoption of the HCC will be published in the **Federal Register**.

This letter and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

September 30, 1987.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,  
Department of the Treasury, Washington, DC 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel the directives of December 23, 1986, April 17, 1987, June 26, 1987 and September 21, 1987, concerning imports into the United States of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in the People's Republic of China and exported during the twelve-month period which began on January 1, 1987 and extends through December 31, 1987.

Effective on September 30, 1987, the directives of December 23, 1986, April 17, 1987, June 26, 1987 and September 21, 1987 are amended to include adjustments to the previously established restraint limits for the following categories, as provided under the terms of the bilateral agreement of August 19, 1983, as amended, and the bilateral agreement, effected by exchange of letters dated September 11 and 14, 1987:<sup>1</sup>

Category	Adjusted 12-month limit <sup>1</sup>
331.....	3,561,213 dozen pairs.
634.....	447,383 dozen.
659-S <sup>2</sup> .....	850,000 pounds.
831.....	117,071 dozen pairs.
847.....	1,023,750 dozen.

<sup>1</sup> The limits have not been adjusted to account for any imports exported after December 31, 1986.

<sup>2</sup> In Category 659-S, only TSUSA numbers 381.2340, 381.3170, 381.9100, 381.9570, 384.1920, 384.2339, 384.8300, 384.8400 and 384.9353.

<sup>1</sup> The agreement provides, in part, that (1) with the exception of Category 315, any specific limit may be exceeded by not more than 5 percent of its square yard equivalent total, provided that the amount of increase is compensated by an equivalent square yard decrease in one or more other specific limits in that agreement year; (2) the specific limits for categories may be increased for carryover or carryforward; and (3) administrative arrangement or adjustments may be made to resolve minor problems arising in the implementation of the agreement.

Also effective on September 30, 1987, you are directed to deduct import charges amounting to 13,000 dozen from the 1987 limit established for Category 634. This same amount is to be charged to the limit established for 1988.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 87-22923 Filed 10-2-87; 8:45 am]

BILLING CODE 3510-DR-M

## CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 87-C0004]

### McCrorry Corp., a Corporation; Provisional Acceptance of a Settlement Agreement

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Provisional acceptance of a Settlement Agreement under the Consumer Product Safety Act.

**SUMMARY:** It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement agreement with McCrorry Corporation, a corporation.

**DATE:** Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by October 20, 1987.

**ADDRESS:** Persons wishing to comment on this Settlement Agreement should send written comments to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

**FOR FURTHER INFORMATION CONTACT:** Ronald G. Yelenik, Directorate for Compliance and Administrative Litigation, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 492-6626.

### SUPPLEMENTARY INFORMATION:

Date: September 30, 1987.

Sheldon D. Butts,  
Deputy Secretary.

### Settlement Agreement and Order

1. This Settlement Agreement and Order, entered into between McCrorry Corporation, a corporation (hereinafter,

"McCrorry"), and the staff of the Consumer Product Safety Commission (hereinafter, "staff"), is a compromise resolution of the matter described herein, without a hearing or determination of issues of law and fact.

### I. The Parties

2. McCrorry is a corporation organized and existing under the laws of the State of Delaware with its principal corporate offices located at 2955 East Market Street, York, Pennsylvania 17402.

3. McCrorry has imported certain baby walkers identified further in paragraphs 6 and 7 below (hereinafter, "baby walkers" or "walkers"), (a) for sale to a consumer for use in or around a permanent or temporary household or residence, or (b) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence. These baby walkers are "consumer products" within the meaning of section 3(a)(1) of the Consumer Product Safety Act (hereinafter, "CPSA"), 15 U.S.C. 2052(a)(1).

4. McCrorry imported and sold these baby walkers at McCrorry Company stores throughout the United States. The product was also sold to other retail stores nationwide. McCrorry, therefore, is a "manufacturer" of a "consumer product" which is "distributed in commerce," as those terms are defined in sections 3(a)(1), (4) and (11) of the CPSC, 15 U.S.C. 2052(a)(1), (4) and (11).

5. The "Staff" is the staff of the Consumer Product Safety Commission, an independent regulatory agency established by Congress pursuant to section 4 of the CPSA, 15 U.S.C. 2053.

### II. The Product

6. Between 1983 and 1986, McCrorry imported nationwide approximately 103,000 baby walkers, Reference No. PHT 417.

7. The subject walkers are circular in design with a silver metal frame and yellow tray, padded vinyl seat, and six yellow plastic wheels.

### III. Staff Allegations Concerning Baby Walkers and of a Failure By McCrorry To Comply With the Reporting Requirements of Section 15(b) of the CPSA

8. The defect is in the buckle of the crotch strap and allows slippage or disengagement under normal use. This defect can result in an infant falling through the seat of the walker to the floor or becoming entrapped in an enlarged leg hole.



9. Unless there is adult intervention to extricate the child, such entrapment could lead to positional asphyxia.

10. By mid-January 1985, McCrory had received three complaints stating that infants had fallen through the seat of the walker. One child sustained a fractured clavicle as the result of a fall.

11. In January 1985, McCrory officials met and decided to stop shipment of the baby walkers from their warehouses to their stores.

12. In March 1985, McCrory received three additional complaints regarding the baby walkers and decided to implement a redesign of the product.

13. In April 1985, McCrory engaged in a stop sale and repair program at the retail level.

14. McCrory knew or should have known by March 1985 that the buckle of the walker's crotch strap allows for slippage or disengagement under normal use, and that an infant could fall through the seat of the walker to the floor or become entrapped in an enlarged leg hole with resulting injuries.

15. McCrory had received sufficient information by March 1985 to reasonably support the conclusion that the baby walkers, described in paragraphs 6 and 7 thereof, contained a defect which could create a substantial product hazard, but the company failed to report such information to the Commission as required by section 15(b) of the CPSA, 15 U.S.C. 2064(b). Section 15(b) requires a manufacturer of consumer products who obtains information that reasonably supports the conclusion that its product contains a defect which could create a substantial product hazard to immediately inform the Commission of the defect.

#### IV. Response of McCrory Corporation

16. McCrory denies that its baby walkers contain a defect which creates or which could create a substantial product hazard within the meaning of Section 15(a) of the CPSA, 15 U.S.C. 2064(a), and further specifically denies an obligation to report information to the Commission under section 15(b) of the CPSA, 15 U.S.C. 2064(b) with respect to these baby walkers.

#### V. Agreement of the Parties

17. McCrory and the staff agree that the Commission has jurisdiction in this matter for purposes of entry and enforcement of this Settlement Agreement and Order.

18. McCrory agrees to settle the Commission's claim for a civil penalty by payment of the amount of \$33,000

within 10 days of final acceptance of this Settlement Agreement by the Commission and service of the Commission's Order on McCrory. This payment is made in settlement of allegations by the staff, disputed by McCrory, that McCrory failed to report to the Commission pursuant to the requirements of section 15(b) of the CPSA, 15 U.S.C. 2064(b), with regard to Reference No. PHT 417 baby walkers imported and sold by McCrory between 1983 and 1986. McCrory makes no admission of any fault, liability or statutory violation and expressly denies any fault, liability or statutory violation. The Commission does not make any determination that Reference No. PHT 417 baby walkers contain a defect which could create a substantial product hazard or that a violation of the CPSA has occurred.

19. For purposes of section 6(b) of the CPSA, 15 U.S.C. 2055(b), this matter shall be treated as if a complaint been issued.

20. Upon final acceptance of this Settlement Agreement by the Commission, McCrory knowingly, voluntarily and completely waives any rights it may have (1) to an administrative or judicial hearing with respect to the Commission's claim for a civil penalty, (2) to judicial review or other challenge or contest of the validity of the Commission's action with regard to its claim for a civil penalty, (3) to a determination by the Commission as to whether a violation of section 15(b) of the CPSA, 15 U.S.C. 2064(b), has occurred, and (4) to a statement of findings of fact and conclusions of law with regard to the Commission's claim for a civil penalty.

21. Upon final acceptance of this Settlement Agreement and Order by the Commission and payment of the \$33,000 settlement amount by McCrory, the Commission agrees to waive its right to pursue any penalty proceeding for a violation of section 15(b) of the CPSA, 15 U.S.C. 2064(b), relating to the matters encompassed by this Settlement Agreement and Order.

22. Upon provisional acceptance of this Settlement Agreement and Order by the Commission, this Settlement Agreement and Order shall be placed on the public record and shall be published in the **Federal Register** in accordance with the procedure set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Settlement Agreement and Order within 15 days, the Settlement Agreement and Order will be deemed

finally accepted on the 16th day after the date it is published in the **Federal Register**, in accordance with 16 CFR 1118.20(f).

23. The parties further agree that the incorporated Order be issued under the CPSA, 15 U.S.C. 2051 *et seq.*, and that a violation of the Order will subject McCrory to appropriate legal action.

24. No agreement, understanding, representation, or interpretation not contained in this Settlement Agreement and Order may be used to vary or to contradict its terms.

Dated: August 10, 1987

McCrory Corporation,

David H. Lissy,

*Vice President, McCrory Corporation.*

The Consumer Product Safety Commission

David Schmeltzer,

*Associate Executive Director, Directorate for Compliance and Administrative Litigation.*

Dated: August 24, 1987.

Ronald G. Yelenik,

*Counsel for the staff of the Consumer Product Safety Commission.*

#### ORDER

Upon consideration of the Settlement Agreement of the parties, it is hereby

Ordered that McCrory Corporation shall pay within 10 days of final acceptance of this Settlement Agreement and service of this Order, a civil penalty in the sum of \$33,000 to the Consumer Product Safety Commission.

Provisionally accepted on the 29th day of September 1987.

By Order of the Commission,

Sayde E. Dunn,

*Secretary, Consumer Product Safety Commission.*

[FR Doc. 87-22904 Filed 10-2-87; 8:45 am]

BILLING CODE 6355-01-M

#### DEPARTMENT OF DEFENSE

##### Office of the Secretary

##### Medical and Dental Reimbursement Rates for Fiscal Year 1988

Notice is hereby given that the Assistant Secretary of Defense (Comptroller) in a September 24, 1987, memorandum to the Assistant Secretary of Defense (Health Affairs), Assistant Secretaries of the Army and Navy (Financial Management), and Comptroller of the Air Force established reimbursement rates for inpatient and outpatient medical and dental care provided during fiscal year 1988 as follows:



	IMET <sup>1</sup>	Inter-agency <sup>2</sup>	Other
Per Inpatient Day:			
—Burn Unit .....	\$1086	\$1762	\$1891
—General Medical and Dental Care .....	179	432	466
Per Outpatient Visit .....	21	56	60
Per FAA Air Traffic Controller Examination .....		89	

<sup>1</sup> International Military Education and Training students.

<sup>2</sup> Other Federal Agency-sponsored patients and Government civilian employees and their dependents outside the United States.

The per diem rate (supplies and subsistence) charged to dependents of military personnel in Federal medical facilities shall become \$7.85 per day beginning January 1, 1988.

Patricia H. Means,  
OSD Federal Register Liaison Officer,  
Department of Defense,  
September 30, 1987.

[FR Doc. 87-22898 Filed 10-2-87; 8:45 am]

BILLING CODE 3810-01-M

## DEPARTMENT OF EDUCATION

[CFDA Nos. 84.044 and 84.066]

### Applications for New Awards Under Talent Search and Educational Opportunity Centers Programs for Fiscal Year 1988

**Purpose:** Provide grant awards under both the Talent Search (TS) and Educational Opportunity Centers Programs (EOC) to permit applicants to carry out projects designed to identify qualified individuals from disadvantaged backgrounds and to assist them in preparing for programs in postsecondary education.

**Deadline for Transmittal or Applications:** December 15, 1987.

**Applications Available:** October 15, 1987.

**Available Funds:** The Administration's budget request for fiscal year 1988 does not include funds for either program. However, applications are invited to allow for sufficient time to evaluate applications complete the grant process before the end of the fiscal year, should the Congress appropriate funds for either or both of these programs. The following estimates are based upon Fiscal Year 1987 appropriations:

**Estimated Range of Awards:** \$70,000–225,000 (TS); \$100,000–500,000 (EOC).

**Estimated Average Size of Awards:** \$112,000 (TS); \$238,000 (EOC).

**Estimated Number of Awards:** 175 (TS); 37 (EOC).

**Project Period:** 36 months.

**Applicable Regulations:** Regulations applicable to this program are:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 74, 75, 77, and 78, and

(b) Regulations governing the Talent Search and Educational Opportunity Centers Programs, 34 CFR 643 and 34 CFR 644 respectively.

**Application Preparation Workshops:** The Department of Education will conduct Application Preparation Workshops to assist prospective applicants in developing applications for the Talent Search and Educational Opportunity Centers Programs. The Scheduled dates and locations are as follows:

October 13 (8:30 a.m.–4:00 p.m.), Washington, DC., G.S.A. Auditorium, R.O.B. #3, 7th and D Streets, SW. (Use "D" St. Entrance)

Host Persons: Mr. Walter Lewis, Chief, Education Outreach Branch, Division of Student Services, (202) 732-4804

October 16 (8:30 a.m.–4:00 p.m.), Chicago, Illinois, Roosevelt University, Room 306, 430 S. Michigan Avenue

Host Person: Dr. Clifton Washington, Roosevelt University (312) 341-3877

October 19 (8:30 a.m.–4:00 p.m.), San Francisco, California, University of San Francisco, Parina Lounge, University Center, Main Entrance, Golden Gate Avenue & Kitteridge

Host Person: Ms. Janice D. Cook, Director, Upward Bound Project (415) 666-6476

#### For Applications or Information

**Contact:** For further information contact Walter Lewis, Chief Education Outreach Branch, Division of Student Services, U.S. Department of Education (Room 3060, Regional Office Building 3), 400 Maryland Avenue SW., Washington, DC 20202. Telephone number: (202) 732-4804.

**Authority:** 20 U.S.C. 1070d-1b, and 1070d-1c.

(Catalog of Federal Domestic Assistance Number: 84.044 and 84.066, Talent Search and Educational Opportunity Centers Programs, respectively)

Dated: September 24, 1987.

C. Ronald Kimberling,

Assistant Secretary for Postsecondary Education.

[FR Doc. 87-23102 Filed 10-2-87; 8:45 am]

BILLING CODE 4000-01-M

## DEPARTMENT OF ENERGY

### Energy Information Administration

#### Agency Collections Under Review by the Office of Management and Budget

**AGENCY:** Energy Information Administration, DOE.

**ACTION:** Notice of requests submitted for clearance to the Office of Management and Budget.

**SUMMARY:** The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for approval under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The listing does not contain information collection requirements contained in new or revised regulations which are to be submitted under 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commission (FERC)); (2) collection number(s); (3) current OMB docket number (if applicable); (4) collection title; (5) type of request, e.g., new, revision, or extension; (6) frequency of collection; (7) response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) affected public; (9) an estimate of the number of respondents per report period; (10) an estimate of the number of responses annually; (11) annual respondent burden, i.e., an estimate of the total number of hours needed to respond to the collection; and (12) a brief abstract describing the proposed collection and the respondents.

**DATES:** Comments must be filed by October 2, 1987. Last notice published Wednesday, September 23, 1987.

**ADDRESS:** Address comments to the Department of Energy Desk Officer, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards, at the address below.)

For Further Information and Copies of Relevant Materials Contact: Carol Patton, Office of Statistical Standards (EI-70), Energy Information Administration, M.S. 1H-023, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-2222.



**SUPPLEMENTARY INFORMATION:** If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this Notice, you should advise the OMB DOE Desk Officer of your intention to do so as soon as possible.

The energy information collection submitted to OMB for review was:

1. Economic Regulatory Administration.
2. ERA-766R.
3. 1903-0073.
4. Recordkeeping Requirements of DOE's Allocation and Price Rules.
5. Extension.
6. On occasion.
7. Mandatory.
8. Businesses or other for profit.
9. 819 recordkeepers.
10. N.A. (Recordkeeping Requirements).
11. 8,190 recordkeeping hours.
12. The ERA-766R requires firms in all segments of the oil industry to maintain only those records essential to the orderly and timely completion of the oil pricing enforcement program. Firms not having such records would be exempt from the recordkeeping requirements of 10 CFR 210.1.

**Statutory Authority:** Secs. 5(a), 5(b), 13(b), and 52, Pub. L. 93-275, Federal Energy Administration Act of 1974, (15 U.S.C. 764(a), 764(b), 772(b), and 790(a)).

Issued in Washington, DC, September 29, 1987.

**Yvonne M. Bishop.**

*Director, Statistical Standards, Energy Information Administration.*

[FR Doc. 87-22889 Filed 10-2-87; 8:45 am]

BILLING CODE 6450-01-M

## Economic Regulatory Administration

### Proposed Consent Order With Diamond Shamrock R and M, Inc.

**AGENCY:** Economic Regulatory Administration, Department of Energy.

**ACTION:** Notice of proposed Consent Order and opportunity for public comment.

**SUMMARY:** The Economic Regulatory Administration (ERA) announces a proposed Consent Order between the Department of Energy (DOE) and Diamond Shamrock R and M, Inc. (Diamond). This Consent Order would resolve Diamond's potential liability for DOE regulatory violations based on an audit which tentatively concluded that Diamond had overcharged in linked crude oil transactions during the period January 1, 1980, through January 27, 1981. Diamond has disputed ERA's audit findings and denies any overcharge

liability. No formal allegations of violations have been issued against Diamond.

ERA proposes that Diamond's liability for potential overcharges and interest be settled by payment of \$15 million over a period of three years, plus interest on any unpaid balances. This proposed settlement reflects negotiated compromises present in every settlement, including assessments of litigation risks in significant areas of dispute between ERA and Diamond. ERA will direct that these monies be deposited in a suitable account for appropriate distribution by DOE.

Pursuant to 10 CFR 205.199, ERA will receive written comments on the proposed Order for thirty (30) days following publication of this Notice. Comments should be addressed to: Diamond Consent Order Comments, RG-30, Economic Regulatory Administration, 1000 Independence Avenue SW., Washington, DC 20585.

ERA will consider the comments received from the public in determining whether to make final the proposed settlement. This will result in one of the following courses of action: Rejection of the settlement; acceptance of the settlement and issuance of a final Order; or renegotiation of the agreement and, if successful, issuance of the modified agreement as a final Order. DOE's final decision will be published in the *Federal Register*, along with an analysis of and response to the significant written and oral comments, as well as any other considerations that were relevant to the decision.

**FOR FURTHER INFORMATION CONTACT:** Dorothy Hamid, Economic Regulatory Administration, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-8900.

Diamond is a refiner subject to the audit jurisdiction of ERA to determine compliance with the federal petroleum price and allocation regulations. During the period covered by this proposed Order, Diamond engaged in, among other things, the production, gathering, transporting, refining and marketing of crude oil and refined petroleum products.

In addition to earlier audits of Diamond which resulted in no allegations of violation, and audits in 1977 and 1979 which resulted in settlements of \$10,301 and \$380,198, respectively, ERA conducted an audit of Diamond's crude oil transactions for the period January 1, 1980, to the date when federal price and allocation controls were ended by the President (January 28, 1981, Executive Order 12287). As a result of this audit, disputes arose

between ERA and Diamond concerning Diamond's compliance with the federal petroleum price and allocation regulations which pertain to the sale of lower or upper tier crude oil in transactions which were related to transactions involving Diamond's acquisition of price-exempt crude oil.

During the audit period from January 1, 1980 through January 27, 1981, Diamond entered into contingent contracts with a crude oil reseller to sell a significant quantity of price-controlled crude oil, certified as lower and upper tier, in return for which the crude oil reseller agreed to sell Diamond equivalent quantities of crude oil certified as stripper crude oil at substantial discounts from market prices. As a result, the audit findings indicate Diamond received prices in excess of those permitted in its sales of controlled crude oil. The total excess consideration, or premiums, alleged to have been unlawfully received by Diamond from the reseller for the barrels of domestic price-controlled crude oil was \$22.5 million.

In its consideration of settlement, ERA reviewed the revenues Diamond received in the sales of price-controlled oil, the costs it incurred in the purchases of price-exempt oil, and the additional entitlements benefits it received. In addition, ERA considered Diamond's contentions that: (1) The linked crude oil transactions reduced Diamond's increased costs which could be recovered in its sales of refined products; (2) the firm lacked banked costs to apply to the pricing of its refined products during the period the linked crude oil transactions occurred; (3) it had an historic mid-range pricing position for refined products among its various competitors; and (4) Diamond significantly lowered its sales prices for those products to below those of its lowest priced competitor in contrast to its historic pricing position. In the context of a negotiated settlement ERA considered it appropriate to give some consideration to these circumstances.

ERA has preliminarily agreed to the settlement amount after assessing the litigation risks associated with establishing the audit findings in litigation, and considering the asserted facts and legal issues underlying the audit, and appropriate settlement compromises related to those issues.

In addition to the analysis of potential litigation risks, ERA took into account such factors as the interest which could be added to possible adjudicated refund amounts, the legal and factual issues, and the time and expense required for the government to fully litigate every



issue. Based on all of these considerations, ERA has tentatively concluded that the resolution of these matters for \$15 million is an appropriate settlement. Given all these factors, ERA has made a preliminary determination that this settlement is in the public interest.

The settlement calls for Diamond to make \$15 million (plus interest from the date of execution of the proposed Order by DOE) in restitutionary payments to discharge in full all of Diamond's obligations under the price and allocation regulations. The restitutionary sum would be paid to DOE for appropriate distribution.

Within thirty days of the effective date of the Consent Order, Diamond will pay DOE the principal restitutionary amount of \$5 million, \$5 million within eighteen (18) months of the effective date of the Consent Order, and \$5 million within thirty-six (36) months of the effective date of the Consent Order, plus accrued interest on the unpaid balances, for appropriate distribution by DOE.

Pursuant to the proposed Consent Order, Diamond and DOE mutually release each other from issues and claims regarding Diamond's compliance with the federal petroleum price and allocation regulations which pertain to the sale of price-controlled crude oil in transactions which were linked to, and contingent upon, transactions involving Diamond's acquisition of other crude oil. The proposed Consent Order would also release Diamond from any other potential civil claims arising under the federal petroleum price and allocation regulations.

#### Submission of Written Comments

The proposed Consent Order cannot be made effective until the conclusion of the public review process, of which this Notice is a part.

Interested persons are invited to submit written comments concerning this proposed Consent Order to the address noted above. All comments received by the thirtieth day following publication of this Notice in the *Federal Register* will be considered before determining whether to adopt the proposed Consent Order as a final Order. Any modifications of the proposed Consent Order which significantly alter its terms or impact will be published for additional comment. If, after considering the comments it has received, ERA determines to issue the proposed Consent Order as a final Order, the proposed Order will be made final and effective by publication of a Notice in the *Federal Register*.

Any information or data considered confidential by the person submitting it must be identified as such in accordance with the provisions of 10 CFR 205.9(f).

Issued in Washington DC, on September 28, 1987.

Milton C. Lorenz,

*Special Council, Economic Regulatory Administration.*

#### I. Introduction

101. This Consent Order is entered into between Diamond Shamrock R & M, Inc. ("Diamond") and the United States Department of Energy ("DOE"). Except as specifically excluded herein, this Consent Order settles and finally resolves all civil and administrative claims and disputes, whether or not heretofore asserted, between the DOE, as hereinafter defined, and Diamond, as hereinafter defined, relating to Diamond's compliance with the Federal petroleum price and allocation regulations during the period January 1, 1973, through January 27, 1981 (all the matters settled and resolved by this Consent Order are referred to hereafter as "the matters covered by this Consent Order").

#### II. Jurisdiction, Regulatory Authority, and Definitions

201

This Consent Order is entered into by the DOE pursuant to the authority conferred by sections 301 and 503 of the Department of Energy Organization Act ("DOE Act"), 42 U.S.C. 7151 and 7193, Executive Order 12009, 42 FR 46267 (1977); Executive Order 12038, 43 FR 4957 (1978); and 10 CFR 205.199J.

202

The Economic Regulatory Administration ("ERA") was created by section 206 of the DOE Act, 42 U.S.C. 7136. In Delegation Order 0204-4, the Secretary of Energy delegated responsibility for the administration of the Federal petroleum price and allocation regulations to the Administrator of the ERA. Authority to enter into this Consent Order on behalf of the DOE has been delegated by the Administrator of the ERA to the Special Counsel by Delegation Order 0204-4A dated December 14, 1981.

203

The following definitions apply for purposes of this Consent Order.

a. "Federal petroleum price and allocation regulations" means all statutory requirements and administrative regulations and orders regarding the pricing and allocation of crude oil, refined petroleum products,

natural gas liquids, and natural gas liquid products, including (without limitation) the entitlements and mandatory oil imports programs and the pricing, allocation, reporting, certification, and recordkeeping requirements imposed by or under the Economic Stabilization Act of 1970, the Emergency Petroleum Allocation Act of 1973, the Federal Energy Administration Act of 1974, Presidential Proclamation 3279, all applicable DOE regulations codified in 6 CFR Parts 130 and 150 and 10 CFR Parts 205, 210, 211, 212, and 213, and all rules, rulings, guidelines, interpretations, clarifications, manuals, decisions, orders, notices, forms, and subpoenas relating to the pricing and allocation of petroleum products. The provisions of 10 CFR 205.199J, and the definitions under the Federal petroleum price and allocation regulations, shall apply to this Consent Order, except to the extent inconsistent herewith.

b. "DOE" includes not only the Department of Energy but also the Cost of Living Council, the Federal Energy Office, the Federal Energy Administration, the Office of Special Counsel ("OSC"), the ERA and all predecessor and successor agencies.

c. "Diamond" includes (1) Diamond Shamrock R & M, Inc., its successors in interest, and its predecessor in interest Diamond Shamrock Corporation and its predecessors in interest, and the subsidiaries and affiliates of the foregoing firms, including Diamond Shamrock Refining and Marketing Company, and their predecessors and successors in interest (but only for the acts of such subsidiaries and affiliates while they were subsidiaries or affiliates of Diamond Shamrock Corporation or one of its predecessors in interest); (2) all of the petroleum-related activities of each of the foregoing firms, including the subsidiaries and affiliates, as refiner, producer, operator, working interest or royalty interest owner, reseller, retailer, natural gas processor, or otherwise; and (3), except for purposes of Article IV, *Infra*, the directors, officers, and employees of each of the foregoing firms including the subsidiaries and affiliates.

#### III. Facts

The stipulated facts upon which this Consent Order is based are as follows:

301

During the period covered by this Consent Order, Diamond was a "refiner" and "producer" of crude oil as those terms are defined in the Federal petroleum price and allocation regulations and was subject to the jurisdiction of the DOE. During the



period covered by this Consent Order, Diamond engaged in, among other things, the production, sale, and refining of crude oil, the sale of residual fuel oil, motor gasoline, middle distillates, aviation fuel, propane, and other refined Petroleum Products, and the extraction, fractionation, and sale of natural gas liquids and natural gas liquid products.

302

In 1973, the DOE began an audit to determine Diamond's compliance with the Federal petroleum Price and allocation regulations. In 1977, pursuant to the mandate of the Secretary of Energy, the ERA continued the audit. The audit encompassed an examination of Diamond's policies and procedures pertaining to, and Diamond's compliance with, the Federal petroleum price and allocation regulations.

303

As part of its audit, the DOE examined Diamond's books and records relating to Diamond's compliance with the Federal petroleum price and allocation regulations and the reporting requirements imposed by those regulations. At the DOE's request, Diamond prepared and submitted to the auditors a number of responses to audit inquiries.

304

During the course of the DOE's audit and the negotiations that led to this Consent Order, the DOE identified certain issues with respect to Diamond's application of the Federal petroleum price and allocation regulations. Diamond maintains that it has calculated its costs, determined its prices, sold its crude oil and petroleum products, and operated in all other respects in accordance with the Federal petroleum price and allocation regulations. The DOE and Diamond disagree concerning the proper application of the Federal petroleum price and allocation regulations to Diamond's activities with respect to the matters covered by this Consent Order, and each believes that its respective legal and factual positions are meritorious. These positions were emphasized in the intensive review and exchange of information conducted during the audit and during the subsequent negotiation process. However, in order to avoid the expense of protracted and complex litigation and the disruption of its orderly business functions, Diamond has agreed to enter into this Consent Order. The DOE believes this Consent Order constitutes a satisfactory resolution of the matters

covered herein and is in the public interest.

#### IV. Remedial Provisions

401.

In full and final settlement of all matters covered by this Consent Order and in lieu of all other remedies which have been or might have been sought by the DOE against Diamond for such matters under 10 CFR 205.1991 or otherwise, Diamond shall pay a total of fifteen million dollars (\$15,000,000) Plus interest to DOE in the manner specified in paragraph 402. OSC and Diamond agree that OSC will petition DOE's Office of Hearings and Appeals to implement special refund procedures pursuant to 10 CFR Part 205, Subpart V, to distribute the amount so paid.

402

Within thirty (30) days of the effective date of this Consent Order, Diamond shall pay five million dollars (\$5,000,000) to DOE. Within eighteen (18) months of the effective date of this Consent Order, Diamond shall make a second payment of five million dollars (\$5,000,000) to DOE. Within thirty-six months of the effective date of this Consent Order, Diamond shall make a third payment of five million dollars (\$5,000,000) to DOE. Diamond may, at its option, combine and accelerate any or all of these payments. Each payment shall be accompanied by a payment of interest in an amount computed in accordance with paragraph 403.

403

Interest shall be computed at the rate of 7.80% per annum, compounded quarterly, on any unpaid principal amount, from the date of execution of this Consent Order by DOE.

404

The payments made pursuant to paragraph 402 of this Consent Order shall be by certified or cashier's check, made payable to the Department of Energy, and delivered to the Office of the Controller, Office of Washington Financial Services, Cash Management Division, Post Office Box 500, Germantown, Maryland 20874-0500.

405

If any payment provided for above becomes more than thirty days overdue, then the entire balance of the settlement amount with interest to the date of payment shall become immediately due and payable at DOE's option. Between the time that any payment or portion thereof is required to be paid under this Consent Order and the time the full

payment is completed, interest shall accrue at the rate prescribed in this Order. Such interest shall be paid to DOE with such overdue payment(s).

406

In the attribution of payments made pursuant to paragraph 402, interest shall be deemed earned before reduction of principal.

407

Concurrent with each payment made pursuant to this Consent Order, Diamond shall send a verification of the payment to: Jay Thompson, Director, Office of Administrator & Financial Management, Economic Regulatory Administration, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

#### V. Issues Resolved

501

All pending and potential civil and administrative claims, whether or not known, demands, liabilities, causes of action or other proceedings by the DOE against Diamond regarding Diamond's compliance with and obligations under the Federal petroleum price and allocation regulations during the period covered by this Consent Order, whether or not heretofore raised by an issue letter, Notice of Probable Violation, Notice of Proposed Disallowance, Proposed Remedial Order, Remedial Order, action in court or otherwise are resolved and extinguished as to Diamond by this Consent Order, except that this Consent Order does not cover or affect Diamond's rights in all regards concerning claims under 10 CFR Part 205, Subpart V, or its claims arising from violations or settlements of alleged violations of the Federal petroleum price and allocation regulations by third parties.

502(a)

Except as otherwise provided herein, compliance by Diamond with this Consent Order shall be deemed by the DOE to constitute full compliance for administrative and civil purposes with all Federal petroleum price and allocation regulations for the matters covered by this Consent Order. In consideration for Diamond's performance as required under this Consent Order, except as to those matters excluded by paragraph 501, the DOE hereby releases Diamond completely and for all purposes from all administrative and civil judicial claims, demands, liabilities or causes of action, including without limitation claims for civil penalties, that the DOE has



asserted or might otherwise be able to assert against Diamond before or after the date of this Consent Order for alleged violations of the Federal petroleum price and allocation regulations with respect to matters covered by this Consent Order. The DOE will not initiate or prosecute any such administrative or civil matter against Diamond or cause or refer any such matter to be initiated or prosecuted, nor will the DOE or its successors directly or indirectly aid in the initiation of any such administrative or civil matter against Diamond or participate voluntarily in the prosecution of such actions. The DOE will not assert voluntarily in any administrative or civil judicial proceeding that Diamond has violated the Federal petroleum price and allocation regulations with respect to the matters covered by this Consent Order or otherwise take any action with respect to Diamond in derogation of this Consent Order. However, nothing contained herein shall preclude the DOE from defending the validity of the Federal petroleum price and allocation regulations.

#### 502(b)

Except for the matters excluded by this paragraph and paragraph 501, the DOE agrees that this Consent Order settles and finally resolves all aspects of Diamond's liability to the DOE under the Federal petroleum price and allocation regulations including but not limited to its capacity as an operator or working interest or royalty interest owner of a crude oil producing property. However, if Diamond was the operator of a property that produced crude oil for all or part of the period covered by this Consent Order, the DOE shall not initiate or prosecute any enforcement action against any person for noncompliance with the Federal petroleum price and allocation regulations during such period relative to such property, except to the extent such person received its interest from such property in kind. The DOE also reserves the right to initiate and prosecute enforcement actions against any person other than Diamond for noncompliance with the Federal petroleum price and allocation regulations, including, for example, suits against operators for overcharges for crude oil when Diamond is a working interest or royalty interest owner in such crude oil production. Diamond and the DOE agree that the amount paid to the DOE pursuant to this Consent Order is not attributable to Diamond's activities as a working interest or royalty interest owner on properties on which it is not

the operator. Furthermore, Diamond and the DOE agree that the Consent Order and the payments hereunder do not resolve, reduce or release the liability of any other person for violations on properties of which (but only for the times during which) Diamond is or was a working interest or royalty interest owner (and not the operator) or affect any rights or obligations between Diamond and such working interest or royalty interest owners.

#### 502(c)

The DOE will not seek or recommend any criminal fines or penalties based on information or evidence presently in its possession for the matters covered by this Consent Order, provided, however, that nothing in this Consent Order precludes the DOE from (1) seeking or recommending such criminal fines or penalties if information subsequently coming to its attention indicates, either by itself or in combination with information or evidence presently known to the DOE, that a criminal violation may have occurred or (2) otherwise complying with its obligations under law with regard to forwarding information of possible criminal violations of law to appropriate authorities. Nothing contained herein may be construed as a bar, estoppel, or defense against any criminal or civil action brought by an agency of the United States other than the DOE under (i) section 210 of the Economic Stabilization Act of 1970 or (ii) any statute or regulation other than the Federal petroleum price and allocation regulations. Finally, this Consent Order does not prejudice the rights of any third party or Diamond in any private action, including an action for contribution by or against Diamond.

#### 502(d)

With respect to matters not excluded from this Consent Order, Diamond releases the DOE completely and for all purposes from all administrative and civil judicial claims, liabilities, or causes of action that Diamond has asserted or may otherwise be able to assert against the DOE relating to the DOE's administration of the Federal petroleum price and allocation regulations. This release, however, does not preclude Diamond from asserting any factual or legal position or argument as a defense against any action, claim, or proceeding brought by the DOE, the United States, or any agency of the United States.

#### 503

Execution of this Consent Order constitutes neither an admission by Diamond nor a finding by the DOE of

any violation by Diamond of any statute or regulation. The DOE has determined that it is not appropriate to seek to impose civil penalties for the matters covered by this Consent Order, and the DOE will not seek any such civil penalties.

None of the payments or expenditures made by Diamond pursuant to this Consent Order are to be considered for any purpose as penalties, fines, or forfeitures or as settlement of any potential liability for penalties, fines or forfeitures.

#### 504

Notwithstanding any other provision herein, with respect to the matters covered by this Consent Order, the DOE reserves the right to initiate an enforcement proceeding or to seek appropriate penalties for any newly discovered regulatory violations committed by Diamond, but only if Diamond has concealed facts relating to such violations. The DOE and Diamond also reserve the right to seek appropriate judicial remedies, other than full rescission of this Consent Order, for any misrepresentation of fact material to this Consent Order during the course of the audit or the negotiations that preceded this Consent Order.

### VI. Recordkeeping, Reporting, and Confidentiality

#### 601

Diamond shall maintain such records as are necessary to demonstrate compliance with the terms of this Consent Order. To assist the DOE in the distribution of the funds paid pursuant to this Consent Order, Diamond also shall maintain, until thirty (30) days after the DOE's final distribution of those funds, sales volume data and customers' names and addresses regarding its sales of crude oil for the period from January 1, 1979, through January 27, 1981. If requested, Diamond shall make such information available to DOE. Except as otherwise provided in this paragraph, upon Diamond's completion of payment to DOE of the amount set forth in paragraph 401 of this Consent Order, Diamond is relieved of its obligation to comply with the recordkeeping requirements of the Federal petroleum price and allocation regulations relating to the matters covered by this Consent Order.

#### 602

Except for formal requests for information regarding other firms subject to the DOE's information gathering and reporting authority, Diamond will not be subject to any audit



requests, report orders, subpoenas, or other administrative discovery by DOE relating to Diamond's compliance with the Federal petroleum price and allocation regulations relating to the matters settled by this Consent Order.

603

The DOE will treat the sensitive commercial and financial information provided by Diamond pursuant to negotiations which were conducted with respect to this Consent Order or obtained by the DOE in its audit of Diamond and related to matters covered by this Consent Order as confidential and proprietary and will not disclose such information unless required to do so by law, including a request by a duly authorized committee or subcommittee of Congress. If a request or demand for release of any such information is made pursuant to law, the DOE will claim any privilege or exemption reasonably available to it. The DOE will provide Diamond with ten (10) days actual notice, if possible, of any pending disclosure of such information, unless prohibited or precluded from doing so by law or request of Congress. The DOE will retain the audit information which it has acquired during its review of Diamond's compliance with the Federal petroleum price and allocation regulations in accordance with the DOE's established records retention procedures. Notwithstanding the otherwise confidential treatment afforded such information by the terms of this Consent Order, the DOE will make such information available to the Department of Justice ("DOJ") in response to a request pursuant to the DOJ's statutory authority by a duly authorized representative of the DOJ. If requested by the DOJ, the DOE shall not disclose that such a request has been made. Nothing in this paragraph shall be deemed to waive or prejudice any right Diamond may have independent of this Consent Order regarding the disclosure of sensitive commercial and financial information.

#### VII. Contractual Undertaking

701

It is the understanding and express intention of Diamond and the DOE that this Consent Order constitutes a legally enforceable contractual undertaking that is binding on the parties and their successors and assigns. Notwithstanding any other provision herein, Diamond (and its successors and assigns) and the DOE each reserves the right to institute a civil action in an appropriate United States district court, if necessary, to secure enforcement of

the terms of this Consent Order, and the DOE also reserves the right to seek appropriate penalties and interest for any failure to comply with the terms of this Consent Order. The DOE will undertake the defense of the Consent Order, as made effective, in response to any litigation challenging the Consent Order's validity in which the DOE is named a party. Diamond agrees to cooperate with the DOE in the defense of any such challenge.

#### VIII. Final Order

801

Upon becoming effective, this Consent Order shall be a final order of DOE having the same force and effect as a remedial order issued pursuant to section 503 of the DOE Act, 42 U.S.C. 7139, and 10 CFR 205.199B. Diamond hereby waives its right to administrative or judicial review of this Order, but Diamond reserves the right to participate in any such review initiated by a third party.

#### IX. Effective Date

901

This Consent Order shall become effective as a final order of the DOE upon notice to that effect being published in the **Federal Register**. Prior to that date, the DOE will publish notice in the **Federal Register** that it proposes to make this Consent Order final and, in that notice, will provide not less than thirty (30) days for members of the public to submit written comments. The DOE will consider all written comments in determining whether to adopt the Consent Order as a final order, to withdraw agreement to the Consent Order, or to attempt to renegotiate the terms of the Consent Order.

902

Until the effective date, the DOE reserves the right to withdraw consent to this Consent Order by written notice to Diamond, in which event this Consent Order shall be null and void. If this Consent Order is not made effective on or before the one hundred twentieth (120th) day following execution by Diamond, Diamond may, at any time thereafter until the effective date, withdraw its agreement to this Consent Order by written notice to the DOE in which event this Consent Order shall be null and void.

I, the undersigned, a duly authorized representative of Diamond Shamrock R & M,

Inc., hereby agree to and accept the foregoing Consent Order on its behalf.

Roger R. Hemminghaus,  
President, Diamond Shamrock R & M, Inc.

Dated: September 18, 1987.

I, the undersigned, a duly authorized representative of the Department of Energy hereby agree to and accept the foregoing Consent Order on its behalf.

Milton C. Lorenz,

Special Counsel, Economic Regulatory  
Administration, Department of Energy.

Dated: August 19, 1987.

[FR Doc. 87-22890 Filed 10-02-87; 8:45 am]

BILLING CODE 6450-01-M

#### Federal Energy Regulatory Commission

[Docket Nos. CP87-545-000 et al.]

#### Natural Gas Certificate Filings; Trunkline Gas Co. et al.

Take notice that the following filings have been made with the Commission:

##### 1. Trunkline Gas Co.

[Docket No. CP87-545-000]

September 25, 1987.

Take notice that on September 17, 1987, Trunkline Gas Company (Trunkline), P.O. Box 1642, Houston, Texas 77001 filed in Docket No. CP87-545-000 an application pursuant to section 7(b) of the Natural Gas Act and the regulations thereunder for an order permitting and approving abandonment of service provided pursuant to a certificate of public convenience and necessity which authorized the receipt, transportation and redelivery of natural gas on behalf of Amoco Production Company (Amoco), all as more fully set forth in the application which is on file with the Federal Energy Regulatory Commission (Commission) and open for public inspection.

Trunkline states that it was authorized in Docket No. CP77-651, dated January 9, 1978, to receive, transport and redeliver natural gas on behalf of Amoco pursuant to, and in accordance with a transportation agreement between Trunkline and Amoco dated August 11, 1977.

Trunkline also states that the authorization in Docket No. CP77-651 provided for the transportation of up to 2,900 Mcf of gas per day for Amoco's account from a portion of receipt in the North Bon Air Field, Jefferson Davis Parish, Louisiana to the interconnection between the facilities of Florida Gas Transmission Corporation and Trunkline in Calcasieu Parish, Louisiana. Trunkline states that it



constructed 50 feet of pipeline and appurtenant facilities to facilitate the receipt of that gas.

Trunkline further states that Amoco has advised that the reserves transported under Docket No. CP77-651 have been depleted, and the transportation service is no longer required by Amoco.

It is stated that Trunkline specifically requests Commission authorization to abandon service provided under Trunkline's Rate Schedule T-39 and to cancel such Rate Schedule effective December 1, 1987, pursuant to a termination letter dated August 7, 1987.

*Comment date:* October 16, 1987, in accordance with Standard Paragraph F at the end of this notice.

## 2. United Gas Pipe Line Co.

[Docket No. CP87-552-000]

September 28, 1987.

Take notice that on September 22, 1987, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP87-552-000 an application pursuant to sections 7 (b) and (c) of the Natural Gas Act to abandon firm direct sales service and substitute new firm and interruptible sales services to various customers, as more fully set forth in the application which is on file with the Commission and open to public inspection.

United seeks authority to provide continued service to various direct sales customers as listed below:

Customer	Old firm CDQ (Mcf)	New CDQ
<b>New Firm Contract:</b>		
Stauffer Chemical Co. <sup>1</sup> ..	8,000	100 MMBtu
<b>New Interruptible Contracts:</b>		
Stauffer Chemical Co. <sup>1</sup> ..	8,000	7,000 Mcf
E.P. Operating Co. (formerly Enserch Exp.) ..	3,000	3,000 Mcf
MOEPSI .....	500	500 Mcf
Texaco Inc. ....	300	300 Mcf

<sup>1</sup> Stauffer previously had one contract for 8,000 MMBtu which has been replaced with new firm and interruptible contracts.

United States that it would use existing facilities to provide these services.

*Comment date:* October 20, 1987, in accordance with Standard Paragraph F at the end of this notice.

## 3. Bayou Interstate Pipeline System Pelican Interstate Gas System

[Docket No. CP87-534-000]

September 25, 1987.

Take notice that on September 10, 1987, Bayou Interstate Pipeline System (Bayou) and Pelican Interstate Gas System (Pelican), (Applicants), 1600 Smith Street Suite 3075, Houston, Texas 77002, filed in Docket No. CP87-534-000 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing interruptible transportation of natural gas for the account of Pontchartrain Natural Gas System (Pontchartrain) and the construction and operation of facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Bayou seeks authorization to utilize 3.3 miles of existing offshore pipeline to transport up to 100,000 MMBtu of natural gas per day, on an interruptible basis, for the account of Pontchartrain pursuant to its December 1, 1986 gas transportation agreement for a primary term of one year and then month to month thereafter. Bayou states that it would have to construct metering, tap, and appurtenant facilities, estimated to cost \$569,000, in order to provide the proposed transportation. Pelican seeks authorization to transport up to 140,000 MMBtu of natural gas per day on an interruptible basis for system supply of Pontchartrain pursuant to its December 1, 1986 gas transportation agreement for a primary term of one year and then month to month thereafter.

Bayou states that it would receive volumes of gas for the account of Pontchartrain at the proposed interconnection of its facilities and those of Amoco Production Company in West Cameron Block 294, offshore Louisiana and redeliver the gas to the proposed interconnection of its facilities and those of Pelican in West Cameron Block 289, offshore Louisiana. Pelican states that it would receive volumes of gas for the account of Pontchartrain at the existing interconnection of its facilities and those of Atlantic Richfield Company in West Cameron Block 211 offshore Louisiana, and at the proposed interconnections of its facilities and (1) those of Santa Fe Mineral's Inc. in High Island Block 129, offshore Texas, (2) those of Bayou in West Cameron Block 289, offshore Louisiana, and (3) those of Samedan Oil Corporation in West Cameron Block 290, offshore Louisiana. Pelican states that it would deliver this gas for the account of Pontchartrain to Natural Gas Pipeline Company of America at the Mobile

Cameron Meadows plant located in Cameron Parish, Louisiana.

Bayou proposes to charge Pontchartrain a transportation fee of \$0.0955 per MMBtu of gas received. Pelican proposes to charge Pontchartrain a transportation fee of \$0.033 per MMBtu of gas received.

*Comment date:* October 16, 1987, in accordance with Standard Paragraph F at the end of this notice.

## 4. Granite State Gas Transmission, Inc.

[Docket No. CP87-550-000]

September 28, 1987.

Take notice that on September 21, 1987, Granite State Gas Transmission, Inc. (Applicant), 120 Royal Street, Canton, Massachusetts 02021, filed in Docket No. CP87-550-000 a request pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) for authority to construct and operate a new delivery point in Plaistow, New Hampshire to its affiliated distributor, Northern Utilities, Inc. (Northern) under the certificate issued in Docket No. CP82-515-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Applicant proposes to add a new delivery point to Northern at its Plaistow, New Hampshire, compressor station through which Northern would serve a new customer with an estimated annual consumption of 2,378 Mcf of natural gas. Applicant states that the new customer could not be economically served from Northern's current distribution system. Applicant indicates that the total volumes delivered to Northern would not exceed the presently authorized volumes.

The total estimated cost of the proposed facilities is \$6,440 which would be reimbursed to Applicant by Northern, it is explained.

*Comment date:* November 12, 1987, in accordance with Standard Paragraph G at the end of this notice.

## 5. Northern Natural Gas Co. Division of Enron Corp.

[Docket No. CP87-533-000]

September 28, 1987

Take notice that on September 9, 1987, Northern Natural Gas Company, Division of Enron Corp. (Northern) 2223 Dodge Street, Omaha, Nebraska 68102, filed in Docket No. CP87-533-000, a request pursuant to section 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for authorization to construct and operate one small volume



measurement station to accommodate gas sales deliveries for residential use to the Hiview Acres Subdivision (Hiview Acres), a non-right-of-way grantor in Finney County, Kansas, who would be served through K N Energy, Inc. (K N Energy), a local distributor, under the certificate issued in Docket No. CP82-401-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

The volumes proposed to be delivered to K N Energy would be within its currently authorized firm entitlement and are estimated to be 8,640 Mcf annually, it is stated. It is further stated that sales to be made at the proposed station would be under Rate Schedule PL-1.

The total estimated cost to construct and operate the sales tap is \$4,500, and K N Energy would not be required to contribute any aid to the construction, it is asserted.

*Comment date:* November 12, 1987, in accordance with Standard Paragraph G at the end of this notice.

**6. Tennessee Gas Pipeline Co., a Division of Tenneco Inc.**

[Docket No. CP87-103-001]

September 25, 1987.

Take notice that on September 15, 1987, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Applicant), P.O. Box 2511, Houston, Texas 7701, filed in Docket No. CP87-103-001 an amendment to its application filed in Docket No. CP87-103-000 pursuant to section 7(c) of the National Gas Act so as to clarify and update the original application, all as more fully set forth in the amendment which is on file with the Commission and open to public inspection.

In Docket No. CP87-103-000, Applicant requested authority to permit its Rate Schedule SS-E and SS-NE customers to use up to one-third of its total authorized winter storage quantity for gas purchased from third-parties. Applicant proposes in Docket No. CP87-103-001 to clarify that the opportunity provided to Rate Schedule SS-E and SS-NE customers to inject third-party gas into Storage is solely at the customer's option. Applicant also proposes to eliminate certain dates in the original application that are now obsolete and modify the pro forma SS-E and SS-NE Rate Schedules in response to various technical questions raised in discussion with Applicant's customers. Applicant states that copies of the filing have been mailed to all parties in Docket No. CP87-103-000.

*Comment date:* October 16, 1987, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

**7. Tennessee Gas Pipeline Co., a Division of Tenneco Inc.**

[Docket No. CP87-543-000]

September 25, 1987.

Take notice that on September 17, 1987, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed an application pursuant to section 7(b) of the Natural Gas Act for authorization to abandon 1.95 miles of 10-inch pipeline located in the South Timbalier Block 54 Field, offshore Louisiana (Tennessee's Line No. 524-C-1100), as more fully set forth in the application which is on file with the Commission and open to public inspection.

Tennessee states that line No. 524-C-1100 was installed in 1976 under budget-type certificate authorization at Docket No. CP76-151-000 and connects the South Timbalier 54-F and 54-D Platforms. The line would be transferred to Exxon Company USA (Exxon) to assist Exxon in the consolidation of facilities and operational revisions in its production operations in the South Timbalier Block 54 Field. Tennessee would continue to purchase natural gas from the South Timbalier Block 54 Field via its 12-inch line which runs from the South Timbalier E platform to the onshore Shell-owned Yscloskey Processing Plant in St. Bernard Parish, Louisiana.

*Comment date:* October 16, 1987, in accordance with Standard Paragraph F at the end of this notice.

**8. United Gas Pipe Line Co.**

[Docket No. CP87-548-000]

September 28, 1987.

Take notice that on September 21, 1987, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP87-548-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon a direct industrial sale of gas to Atlas Processing Company (Atlas), at a point near Shreveport, Caddo Parish, Louisiana, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

United states that it notified Atlas by letter dated August 4, 1986, that the 1981 operating agreement between United and Atlas was cancelled effective September 4, 1986. It is stated that Atlas acknowledged receipt of the notice of

cancellation by letter dated December 19, 1986. United further states that continuation of the present service is not in the public interest and it requests that the Commission permit the termination of direct sale service to the extent required.

United is not requesting abandonment authority of any facilities. United states that the subject delivery facilities would be left in place to accommodate either future transportation service or new sales service if appropriate contractual arrangements can be made. United states that if such new arrangements are not made, it will file to abandon such facilities.

*Comment date:* October 16, 1987, in accordance with Standard Paragraph F at the end of this notice.

**9. Arkla Energy Resources a Division of Arkla, Inc.**

[Docket No. CP87-551-000]

September 28, 1987.

Take notice that on September 22, 1987, Arkla Energy Resources (AER), a division of Arkla, Inc., P.O. Box 21734, Shreveport, Louisiana 71151, filed in Docket No. CP87-551-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to undertake certain actions and activities necessary to effect the abandonment and transfer to Arkansas Louisiana Gas Company (ALG), also a division of Arkla, Inc., of certain certificated facilities in Oklahoma and Kansas, under the certificate issued in Docket Nos. CP82-384-000 and CP82-384-001 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application that is on file with the Commission and open to public inspection.

It is stated that AER has concluded that in the area of Hominy and Altus, Oklahoma, and Sterling, Kansas, it is operating facilities under a certificate issued in Docket No. CP60-79 which are used exclusively for retail sales of natural gas, rather than for transmission functions. AER states that at Hominy, Oklahoma, the facilities in question are used solely for ALG's receipt of gas from another pipeline supplier. AER further states that, in the other two locations, the facilities in question are lines from which service is provided to rural domestic customers of ALG. AER requests authority to abandon these facilities and, in one instance, it requests a certificate to construct at an estimated cost of \$4,612 a new 1-inch tap and appurtenant facilities in Jackson County, Oklahoma, to serve Lines 8-G-2 and 8-G-3 which are proposed to be



abandoned. AER represents that granting its application will have no effect on the level of its deliveries or on service to existing customers.

*Comment date:* November 12, 1987, in accordance with Standard Paragraph G at the end of this notice.

#### Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a

protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

**Kenneth F. Plumb,**

*Secretary.*

[FR Doc. 87-22887 Filed 10-2-87; 8:45 am]

BILLING CODE 6717-01-M

#### [Docket No. RP87-150-000]

#### Change in Sale Rates and Adoption of ACA Clause; Pacific Interstate Offshore Co.

September 29, 1987.

Take notice that on September 25, 1987, Pacific Interstate Offshore Company ("PIOC") submitted for filing, to be a part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets:

##### Original Volume No. 1

Sixth Revised Sheet No. 4

First Revised Sheet No. 5

First Revised Sheet No. 20

First Revised Sheet No. 35

PIOC states the purpose of this filing is to establish an Annual Charge Adjustment Clause ("ACA" Clause) in PIOC's tariff as appropriate and to set forth the applicable surcharge in its sales rate schedule as required by Order No. 472.

PIOC requests an effective date of October 1, 1987.

A copy of the filing has been served on PIOC's sole customer, Southern California Gas Company and the Public Utilities Commission of the State of California.

Any persons desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE. Washington DC 20426, in accordance with Rule 211 or 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before October 6, 1987. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Kenneth F. Plumb,**

*Secretary.*

[FR Doc. 87-22946 Filed 10-2-87; 8:45 am]

BILLING CODE 6717-01-M

#### [Docket No. RP87-148-000]

#### Change in Rates and Tariff Revisions; Sea Robin Pipeline Co.

September 29, 1987.

Take notice that on September 25, 1987, Sea Robin Pipeline Company (Sea Robin), tendered for filing with the Commission to be effective October 1, 1987 the following tariff sheets to be included in Sea Robin's FERC Gas Tariff:

##### Original Volume No. 1

Forty-Eighth Revised Sheet No. 4

Twenty-Sixth Revised Sheet No. 4-A

Third Revised Sheet No. 4-A1

Third Revised Sheet No. 4-A2

Original Sheet No. 22-A

Original Revised Sheet No. 22-B

##### Original Volume No. 2

Thirty-First Revised Sheet No. 127-D

Thirty-First Revised Sheet No. 135-C

Sea Robin states that the Commission by Order No. 472 issued May 29, 1987 implemented procedures providing of the assessment and collection from interstate pipelines, of annual charges as required by the Omnibus Budget Reconciliation Act of 1986. Pursuant to Order No. 472, the Commission authorized the tracking for automatic pass through to pipeline customers for the annual charges under an Annual Charge Adjustment ("ACA") clause. Sea Robin states that it is making this filing pursuant to § 154.38 (d)(6) of the Commission's Regulations in order to include in its FERC Gas Tariff the procedure for collecting its assessed amount from its customers.

To the extent required, if any, Sea Robin requests that the Commission grant such waivers as may be necessary for acceptance of the tariff sheets submitted herewith, to become effective October 1, 1987.

Copies of this letter and enclosures are being served on jurisdictional customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before October 6, 1987. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party



must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-22947 Filed 10-2-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP87-149-000]

### Change in Rates and Tariff Revisions; United Gas Pipe Line Co.

September 29, 1987.

Take notice that on September 25, 1987, United Gas Pipe Line Company (United), tendered for filing with the Commission to be effective October 1, 1987 the following tariff sheets to be included in United's First Revised Volume No. 1 of United's FERC Gas Tariff:

Seventy-Eighth Revised Sheet No. 4  
Twenty-Second Revised Sheet No. 4-C  
Eight Revised Sheet No. 4-D  
Seventh Revised Sheet No. 4-E  
Original Sheet No. 74-K1  
Original Sheet No. 74-K2

Seventy/Eighth Revised Sheet No. 4  
Twenty/Second Revised Sheet No. 4-C  
Eight Revised Sheet No. 4-D  
Seventh Revised Sheet No. 4-E  
Original Sheet No. 74-K1  
Original Sheet No. 74-K2

United states that the Commission by Order No. 472 issued May 29, 1987, implemented procedures providing for the assessment and collection from interstate pipelines, of annual charges as required by the Omnibus Budget Reconciliation Act of 1986. Pursuant to Order No. 472, the Commission authorized the tracking for automatic pass through to pipeline customers of the annual charges under an Annual Charge Adjustment ("ACA") clause. United states that it is making this filing pursuant to § 154.38 (d)(6) of the Commission's Regulations in order to include in its FERC Gas Tariff the procedure for collecting its assessed amount from its customers.

To the extent required, if any, United requests that the Commission grant such waivers as may be necessary for acceptance of the tariff sheets submitted herewith, to become effective October 1, 1987.

Copies of this letter and enclosures are being served on jurisdictional customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211

and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before October 6, 1987. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-22948 Filed 10-2-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. QF87-644-000]

### Small Power Production; Application for Commission Certification of Qualifying Status of a Cogeneration Facility; Arrowhead Cogeneration Co. Limited Partnership

September 25, 1987.

On September 8, 1987, Arrowhead Cogeneration Company Limited Partnership (Applicant), of 3003 Summer Street, Stamford, Connecticut 06905, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration will be located in Milton, Vermont and will consist of a combustion turbine generator, a heat recovery steam generator equipped with a supplementary firing burner, and an extraction/condensing steam turbine generator. Thermal energy recovered from the facility in the form of steam will be utilized by the Wyeth Nutritionals Inc. Plant. The electric power production capacity of the facility will be 27,890 KW. The primary source of energy will be natural gas. Construction of the facility is expected to begin in October, 1988.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by

the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,  
Secretary.

[FR Doc. 87-22945 Filed 10-2-87; 8:45 am]

BILLING CODE 6717-01-M

### ENVIRONMENTAL PROTECTION AGENCY

[AMS-FRL-3272-7]

### Air Pollution Control; Motor Vehicle Emission Factors; Public Workshop

AGENCY: Environmental Protection Agency.

ACTION: Notice of public workshop.

**SUMMARY:** This notice announces a public workshop which the Environmental Protection Agency will hold regarding the Agency's motor vehicle emission factors. The emission factors are used by States in preparing State Implementation Plan revisions and by others engaged in determining the air quality impact of motor vehicles. The Agency's purpose in holding this workshop is to meet with those parties potentially possessing information which would be of use in evaluating the emission factors and to allow all interested parties to participate informally in the review of the EPA information.

**DATE:** The workshop is being held on Tuesday, November 10, 1987, at 9:00 a.m.

**ADDRESS:** The workshop will be held at EPA's Motor Vehicle Emission Laboratory, 2565 Plymouth Road, Ann Arbor, Michigan 48105.

**FOR FURTHER INFORMATION CONTACT:** Lois Platte (313) 668-4306, Emission Control Technology Division, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, Michigan 48105.

**SUPPLEMENTARY INFORMATION:** EPA's current estimates of emission factors are contained in the computer program MOBILE3, and have been published in the report entitled, "Compilation of Air Pollutant Emission Factors: Mobile Sources", Vol. II, Fourth Edition. MOBILE3 was released in mid-1984, and since that time much additional in-use vehicle emission data have been collected and evaluated. EPA believes that incorporating this data into a new model, MOBILE4, would be beneficial to



States and local agencies using the model for long term attainment planning.

The current timetable calls for release of MOBILE4 by December 30, 1987. EPA held the first public workshop on the subject of MOBILE4 in April 1987. At that workshop, EPA presented various proposals for the MOBILE4 emission factors. The purpose of the October 14 workshop is to provide information on the development and results of the draft version of MOBILE4. Following the October workshop, a brief comment period will be scheduled. It will be the last opportunity for comment prior to release of the final version of MOBILE4.

Specific topics that will be discussed in the October 14 workshop include:

- Registration and vehicle miles traveled distributions
- Heavy-duty vehicle emission factors
- Inspection and maintenance credits
- Tampering rates
- Emission rates for 1981 and newer cars

Information on items for which there is not sufficient time to make a formal presentation will be disseminated through handouts made available at the workshop.

Because of the technical nature of the agenda, participants should be familiar with the existing emission factors and MOBILE3 to most fully contribute to the discussions.

This workshop will not discuss the programming aspects of the MOBILE3 computer program, such as its interface with other programs used in preparing emission inventories and air quality plans, and the language and equipment requirements of the program.

The workshop is intended to be a forum for exchange of information and has no direct connection to any rulemaking action. Consequently, the workshop will be very informal. There will be no opportunity for prepared statements in general, although prepared remarks will be welcome on specific issues as those are brought up for discussion. Although no public docket will be kept, written submissions are welcome at any time and may be brought to the workshop or mailed to Lois Platte, at the address set out above.

Date: September 14, 1987.

Don R. Clay,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 87-22917 Filed 10-2-87; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3272-6]

**Science Advisory Board,  
Environmental Engineering  
Committee; Open Meeting October 22  
and 23, 1987**

Under Pub. L. 92-463, notice is hereby given that the Environmental Engineering Committee's Mine Waste Risk Screening Subcommittee of the Science Advisory Board will meet from 9:00 a.m. to 12:00 noon on Thursday, October 22, 1987 in the Administrator's Conference Room 1101 West Tower, 401 M Street SW., Washington, DC. The Subcommittee will complete the preparation of its report on the Office of Solid Waste's technical support document entitled: "Draft Risk Screening Analysis of Mining Wastes," dated September 21, 1987.

The Environmental Engineering Committee will meet at 1:30 p.m. till 5:00 p.m. on Thursday, October 22nd and from 9:00 a.m. till 4:00 p.m. on Friday, October 23rd at the same location. The Committee will hear the report of the Mine Waste Risk Screening Subcommittee and be briefed by the Agency on a variety of Environmental Protection Agency's engineering activities.

The meeting is open to the public. Any member of the public wishing to attend or submit written comments should notify Mrs. Kathleen Conway, Deputy Director, Science Advisory Board, at 202-382-2552 or Joanna Foellmer at 202-382-4126 by October 16, 1987.

Date: September 28, 1987.

Kathleen Conway,

Acting Director, Science Advisory Board.

[FR Doc. 87-22918 Filed 10-2-87; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3272-4]

**Walter Pollution Control; Highlands  
Aquifer System in Passaic, Morris and  
Sussex Counties, and Orange County  
NY, Sole Aquifer Final Determination**

**AGENCY:** U.S. Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that, pursuant to section 1424(e) of the Safe Drinking Water Act, the Regional Administrator of the U.S. Environmental Protection Agency (EPA) Region II has determined that the Highlands Aquifer System, underlying portions of Passaic, Morris and Sussex Counties, New Jersey and Orange County, New York, is the sole or principal source of drinking water for portions of the Townships of West Milford, Jefferson, Rockaway, Vernon, and Hardyston, and a portion of

the Borough of Pampton Lakes, the entire Boroughs of Bloomingdale, Ringwood, Wanaque, Butler and Riverdale, New Jersey; and portions of the Townships of Warwick and Tuxedo, and the entire Village of Greenwood Lake, New York. This aquifer, if contaminated, would create a significant hazard to public health. As a result of this action, all Federal financially assisted projects constructed in the designated Highlands Aquifer Area will be subject to EPA review to ensure that these projects are designed and constructed such that they do not create a significant hazard to public health.

**DATE:** This determination shall be promulgated for purposes of judicial review at 1:00 p.m. Eastern Daylight time on October 19, 1987.

**ADDRESSES:** The data on which these findings are based are available to the public and may be inspected during normal business hours at the U.S. Environmental Protection Agency, Office of Ground Water Management, Room 805, 26 Federal Plaza, New York, New York 10278.

**FOR FURTHER INFORMATION CONTACT:** John S. Malleck, Chief, Office of Ground Water Management, Room 805, Environmental Protection Agency, Region II at (212) 264-5635.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 1424(e) of the Safe Drinking Water Act (42 U.S.C., 300f, 300h-3(e), Pub. L. 93-523) states:

(e) If the Administrator determines on his own initiative or upon petition, that an area has an aquifer which is the sole or principal drinking water source for the area and which, if contaminated, would create a significant hazard to public health, he shall publish notice of that determination in the FEDERAL REGISTER. After the publication of any such notice, no commitment for Federal financial assistance (through a grant, contract, loan guarantee, or otherwise) may be entered into for any project which the Administrator determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health, but a commitment for Federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer.

On March 9, 1987, the Administrator duly delegated to the Regional Administrator the authority to determine, under section 1424(e) of the Safe Drinking Water Act, 42 U.S.C. 300h-3(e), that an area has an aquifer which is the sole or principal source of drinking water for the area and which, if



contaminated, would create a significant hazard to public health.

On March 14, 1985, EPA received a petition from Mr. Charles Slawinski, Mayor of the Township of West Milford and Dr. Ella F. Filippone, Executive Administrator of the Passaic River Coalition, which asked EPA to designate the Highlands Aquifer System as a sole or principal source aquifer. A public hearing was conducted on December 9, 1986 and the public was permitted to submit written comments on the petition request until January 9, 1987.

The petition submitted to EPA encompassed the Pochuck, Wanaque and Pequannock River drainage basins. However, based on EPA's review of the hydrogeologic information, the Pochuck River drainage basin has been deleted from the final sole source designation area. A major basin divide exists between the Pochuck River which runs west and north, and the Pequannock and Wanaque Rivers which run south and east. This basin divide, in conjunction with the lack of evidence to support a statement to the contrary, lead EPA to conclude that the Pochuck River drainage basin is not part of the same aquifer system as the Wanaque and Pequannock. Available information indicates that the Pochuck could meet Sole Source Aquifer criteria; however, more information is needed.

## II. Basis for Determination

Among the factors to be considered by the Agency in connection with the designation of a sole source aquifer area under section 1424(e) are: (1) Whether the Highlands Aquifer System is the area's sole or principal source of drinking water and (2) whether contamination of the aquifer would create a significant hazard to public health. On the basis of technical information available to this Agency, the following are the findings, which are the basis for the determination noted above:

1. The Highlands Aquifer System as defined by the EPA currently serves as the "Sole or Principal Source" of drinking water for approximately 89,121 persons in the service area, representing 85 percent of the population.

2. There is no existing or potential alternative drinking water source or combination of sources capable of replacing the Highlands Aquifer System should it become contaminated.

3. The Highlands Aquifer System consists of Quaternary glacial drift, Paleozoic sedimentary formations, and Pre-cambrian permeable soil characteristics. This aquifer system is susceptible to contamination through its recharge zone from a number of sources,

including, but not limited to, chemical spills, high way and urban area runoff, septic systems, leaking storage tanks (above and underground), and landfill leachate. Since ground water contamination can be difficult or sometimes impossible to remediate and since the aforementioned communities rely on the Highlands Aquifer System for drinking water purposes, contamination of the aquifer would pose a significant hazard to public health.

## III. Description of the Highlands Aquifer System of Passaic, Morris and Sussex Counties, New Jersey, and Orange County, New York Area, its Recharge Zone and Streamflow Source Zone

The Highlands Aquifer System is composed of permeable glacial drift overlying permeable sedimentary and fractured igneous and metamorphic formations.

For the purpose of this designation, the Highlands Aquifer System is considered to include the entirety of the Wanaque and Pequannock River basins in New Jersey and New York. The aquifer system covers approximately 195 square miles and includes portions of the Townships of West Milford, Jefferson, Rockaway, Vernon and Hardyston, and portions of the Borough of Pompton Lakes, the entire Boroughs of Bloomingdale, Ringwood, Wanaque, Butler and Riverdale, New Jersey; portions of the Townships of Warwick and Tuxedo, and the entire Village of Greenwood Lake, New York.

Because the Wanaque and Pequannock River basins are covered with permeable sediments, the recharge zone, where water percolates directly to the aquifer, includes the entire areal extent of the Highlands Aquifer Area. Since no streams flow into the Wanaque and Pequannock River basins, there is no streamflow source zone for the aquifer.

The boundary of both the designated area and aquifer service area are the boundaries of the Wanaque and Pequannock River basins. Thus, the designated area in which Federal financially assisted projects will be subject to review is the Wanaque and Pequannock River basins which include portions of Passaic, Morris and Sussex, Counties New Jersey, and Orange County, New York.

## IV. Information Utilized in Determination

The information utilized in this determination includes the petition, written and verbal comments submitted by the public, various technical publications and verbal communication with various departments in the affected

municipalities. The above data are available to the public and may be inspected during normal business hours at the U.S. Environmental Protection Agency, Region II, Office of Ground Water Management, Room 805, 26 Federal Plaza, New York, New York 10278.

## V. Project Review

EPA Region II is working with the Federal agencies that may provide financial assistance to projects in the area of concern. Interagency procedures and Memoranda of Understanding have been developed through which EPA will be notified of proposed commitments by Federal agencies for projects which could potentially contaminate the Highlands Aquifer System, upon which portions of the Townships of West Milford, Jefferson, Rockaway, Vernon, Hardyston, and a portion of the Borough of Pompton Lakes, the entire Boroughs of Bloomingdale, Ringwood, Wanaque, Butler and Riverdale, New Jersey; portions of the Townships of Warwick and Tuxedo, and the entire Village of Greenwood Lake, New York are dependent for their sole or principal source water supply. EPA will evaluate such projects and, where necessary, conduct an in-depth review, including soliciting public comments where appropriate.

In many cases, these Federally assisted projects may also be analyzed in an "Environmental Impact Statement" (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C). All EIS, as well as any other proposed Federal actions affecting an EPA program or responsibility, are required by Federal law (under the "NEPA/309" process) to be reviewed and commented upon by the EPA Administrator (42 U.S.C. 7609 requires EPA to conduct this review). The "309" in a "NEPA/309" derives from the original source of this general requirement, section 309 of the Clean Air Act.

Therefore, in order to streamline EPA's review of the possible environmental impacts on designated aquifers, when an action is analyzed in an EIS, the two reviews will be consolidated and both authorities will be cited. The EPA review (under the Safe Drinking Water Act) of Federally-assisted projects potentially affecting sole or principal source aquifers will be included in the EPA review (under the "NEPA/309" process) of any EIS accompanying the same Federally-assisted project. The letter transmitting EPA's comments on the final EIS to the lead agency will be the vehicle for



informing the lead agency of EPA's actions under section 1424(e)

Should the Regional Administrator determine that a project may contaminate the aquifer through its recharge zone so as to create a significant hazard to public health, no commitment for Federal financial assistance may be entered. However, a commitment for Federal financial assistance may, if authorized under another provision of law, be entered into to plan or design the project to assure that it will not so contaminate the aquifer.

The U.S. Environmental Protection Agency will rely to the maximum extent possible on any existing or future State and local control mechanisms in protecting the ground water quality of the Highlands Aquifer System. EPA review of any Federally financially assisted project will be coordinated with the State and local agencies and their comments will be given full consideration. The Federal review process will attempt to complement and support State and local ground water protection mechanisms.

#### IV. Summary and Discussion of Public Comments.

The majority of verbal and written comments received on the petition were in favor of designating the Highlands Aquifer System as a sole or principal source aquifer. A public hearing was held on December 9, 1986. The New Jersey Department of Environmental Protection (NJDEP) presented the only statement in opposition to the designation at the hearing. The only letter received in opposition was from the New York State Department of Environmental Conservation (NYSDEC).

The NJDEP questioned the boundaries of the aquifer. They also urged EPA to act on New Jersey's statewide petition in lieu of designating the Highlands Aquifer System which is only a small portion of the State.

The boundaries of the Highlands Aquifer System are based on a USGS report (Carswell and Rooney, 1976), which state that the aquifer boundaries in this area follow the surface water divides. It is EPA's general policy to act on petitions in the order in which they are submitted. The statewide petition is currently being revised; therefore, EPA is not in a position to make a determination on it.

NYSDEC contends that the Highlands Aquifer System is not of national or statewide significance for public water supply. They believe sole source designation of this area would require the diversion of limited program funds away from "primary public water supply

aquifers" which have been targeted in the New York Upstate Ground Water Management Program as priority management areas.

NYSDEC did not give their definition of "national or statewide significance". The sole source aquifer program criteria requires that the aquifer be needed to supply 50 percent or more of the drinking water in the aquifer service area. The Region has found that the Highlands Aquifer System meets this criteria, and, therefore, it is of national and statewide significance. This criteria differs from that of NYSDEC's primary public water supply aquifer program, and it does not require consideration of individual state priorities basins.

NYSDEC also questioned the petitions population statistics for people in the New York Area served by ground water. None of the areas in which NYSDEC questioned is included in the designated area.

#### VII. Economic and Regulatory Impact

Pursuant to the provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), I hereby certify that the attached rule will not have a significant impact on a substantial number of small entities. For purposes of this Certification, the "small entity" shall have the same meaning as given in section 601 of the RFA. This action is only applicable to portions of Passaic, Morris, and Sussex Counties, New Jersey, and Orange County, New York. The only affected entities will be those area-based businesses, organizations or governmental jurisdictions that request Federal financial assistance for projects which have the potential for contaminating the aquifer so as to create a significant hazard to public health. EPA does not expect to be reviewing small isolated commitments of financial assistance on an individual basis, because their potential for contaminating the aquifer is remote. Accordingly, the number of affected small entities will be minimal. However, if the Region anticipates that a cumulative impact on the aquifer will occur, small isolated commitments will be reviewed.

For those small entities which are subject to review, the impact from today's action will not be significant. Most projects subject to this review will be preceded by a ground water impact assessment required pursuant to other Federal laws, such as the National Environmental Policy Act (NEPA) as amended 42 U.S.C. 4321, *et seq.* Integration of those related review procedures will allow EPA and other Federal agencies to avoid delay or duplication of effort in approving

financial assistance, thus minimizing any adverse effect on those small entities which are affected. Finally, today's action does not prevent grants of Federal financial assistance which may be available to any affected small entity in order to pay for the redesign of the project to assure protection of the aquifer.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not major because it will not have an annual effect of \$100 million or more on the economy, will not cause any major increase in costs or prices and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete in domestic or export markets. Today's action only affects the Highlands Aquifer System which underlies portions of Passaic, Morris, and Sussex Counties, New Jersey, and a portion of Orange County, New York.

It provides an additional review of ground water protection measures, incorporating state and local measures whenever possible, for only those projects which request Federal financial assistance.

Dated: September 25, 1987.

Christopher J. Daggett

Regional Administrator.

[FR Doc. 87-22920 Filed 10-2-87; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3272-5]

#### Sole Source Designation of the Newberg Area Aquifer, Snohomish County, WA

AGENCY: U.S. Environmental Protection Agency.

ACTION: Final determination.

SUMMARY: Pursuant to section 1424(e) of the Safe Drinking Water Act, the Administrator of the U.S. Environmental Protection Agency has determined that the Newberg Area Aquifer in Snohomish County, Washington is the sole source of drinking water for the Newberg Road-Lake Bosworth area and that the aquifer, if contaminated, would create a significant hazard to public health. As a result of this action, federal financially assisted projects constructed in the designated area will be subject to EPA review to ensure that these projects are designed and constructed so that they do not create a significant hazard to public health.



**EFFECTIVE DATE:** This determination shall be promulgated for purposes of judicial review at 1:00 p.m. Eastern time on October 19, 1987.

**ADDRESSES:** The data upon which these findings are based are available to the public and may be inspected during normal business hours at the EPA Region 10 Library, 1200 Sixth Avenue, Seattle, Washington or any of the following city libraries: Granite Falls, Washington; Lake Stevens, Washington; Everett, Washington; Marysville, Washington.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Williams at (206) 442-1541 or FTS 399-1541.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that pursuant to Section 1424(e) of the Safe Drinking Water Act (42 U.S.C., 300f, 300-3(e), Pub. L. 93-523) the Administrator of the U.S. Environmental Protection Agency has determined that the Newberg Area Aquifer located in Snohomish County, Washington is a sole or principal source of drinking water for much of the aquifer service area. Pursuant to section 1424(e), federal financially assisted projects constructed in this designated area will be subject to EPA review.

### I. Background

Section 1424(e) of the Safe Drinking Water Act states: "If the Administrator determines, on his own initiative or upon petition, that an area has an aquifer which is the sole or principal drinking water source for the area and which, if contaminated, would create a significant hazard to public health, he shall publish notice of that determination in the **Federal Register**. After the publication of such notice, no commitment for federal financial assistance [through a grant, contract, loan guarantee, or otherwise] may be entered into for any project which the Administrator determines may contaminate such aquifer through a recharge zone so as to create a significant hazard to public health, but a commitment for federal financial assistance may, if authorized under another provision of the law, be entered into to plan or designate the project to assure that it will not so contaminate the aquifer."

On January, 16, 1984, the Region 10 Office of the Environmental Protection Agency (EPA) received a petition from the Newberg Organization, Inc., a group composed mostly of property owners in the Lake Bosworth area of Snohomish County, Washington. The petitioners requested that the EPA designate an area traversed by Newberg Road and including Lake Bosworth (the Newberg

Road—Lake Bosworth Area) as a sole source aquifer and recharge area. A **Federal Register** notice announcing receipt of the petition and requesting public comment was published on March 8, 1984 (VI, 49, No. 47). The petitioners submitted additional data to the EPA in support of their petition in October 1985 and June 1987.

After analyzing additional information, the EPA regional office adjusted the boundary of the designated area to coincide with the aquifer and recharge area boundaries. A resource document which delineated the aquifer and recharge area boundaries and summarized available information about the geology and hydrology of the area was distributed on July 23, 1987. On that same date, EPA issued a press release announcing the availability of the resource document and requesting public comment. In addition to the press release, information was made available through a legal notice which was printed in the "Everett Herald" on July 26, 1987 and sent to area post offices the week before. The public meeting scheduled for August 20, 1987 was cancelled due to a lack of public interest. No written comments were received before the public comment period expired on September 4, 1987.

### II. Basis For Determination

Among the determinations which the Administrator must make in connection with the designation of an area under Section 1424(e) are: (1) Whether the aquifer is the sole or principal source of drinking water in the area, and (2) whether, if contaminated, a significant hazard to public health would result.

Based on the information available to this Agency, the Administrator has made the following findings, which are the bases for the determination noted above:

1. The Newberg Area Aquifer is the principal source of drinking water for of the Newberg Road-Lake Bosworth area in Snohomish County, Washington. The aquifer supplies about 84 percent of the drinking water used by the 2,700 residents of the area. No feasible alternative drinking water source or combination of sources could replace the aquifer should it become contaminated.

2. Because ground-water contamination can be difficult or impossible to reverse and because the aquifer in this area is the principal source of drinking water for the area's residents, contamination of the aquifer could pose a significant hazard to public health.

### III. Description of The Newberg Area Aquifer

[Information in this section represents an unfootnoted summary of material from: *Resource Document for the Consideration of the Newberg Area Aquifer as a Sole Source Aquifer*, published in July of 1987 by the Region 10 Office of Ground Water.]

The Newberg Road-Lake Bosworth Area, hereafter referred to as the "Newberg Area," is located in west-central Snohomish County, Washington. The designated area is approximately 37 square miles in area and is located approximately 15 miles east of the cities of Everett and Marysville, and immediately south of the Town of Granite Falls. It is an area of high ground bounded by the valley of the Pilchuck River on the east, north and west sides. The downstream segment of Dubuque Creek and the upstream segment of Carpenter Creek form the southern boundary. Land surface elevations range from 120 feet at the junction of the Pilchuck River and Dubuque Creek to a maximum of 800 feet near the center of the designated area.

The geology of the sole source aquifer area is described on four recently produced geologic maps. These maps depict the nature and distribution of surficial materials and bedrock within and near the area, and provide a synopsis of regional stratigraphic relationships. Copies of these maps are available for perusal by the public at the library of the U.S. Environmental Protection Agency Region 10 office, Seattle, Washington. These maps can also be purchased directly from the U.S. Geological Survey.

The designated area is characterized by a thick accumulation of heterogeneous, unconsolidated glacial sediments overlying assorted bedrock units of varied origins. Only isolated bedrock outcrops occur within or immediately adjacent to the petitioned area; areally extensive bedrock exposures occur only in the more rugged areas to the east and southeast.

Unconsolidated glacial and other surficial deposits cover the surface of the Newberg area to a thickness of more than 300 feet in places. Glacial sediments were deposited approximately 15,000 years ago during what has been termed the Vashon Stage of the Fraser Glaciation. These unconsolidated materials, when saturated, provide the primary source of ground water used for drinking water purposes in the Newberg area and vicinity.



The surficial deposits in the Newberg area include, in order of deposition, pre-Vashon or early Vashon deposits, glacial advance outwash sediments, glacial till, and recessional outwash material of the vashon age glaciation. More recent alluvial deposits are found along river and stream courses.

Wells in the Newberg area and vicinity tap all of the types of unconsolidated (glacial) materials and, at some localities, two types of bedrock: Tertiary volcanic and Tertiary sediment rocks. Bedrock wells provide only small quantities of water, nominally sufficient for domestic consumption. Wells installed in unconsolidated glacial deposits provide most of the ground water used in the area.

The majority of ground water users in the proposed sole source aquifer area utilize deeper ground water in unconsolidated deposits. About 200 wells tap ground water occurring under apparently semi-confined conditions at depths of approximately 50 to 400 feet below the land surface. (Because of the relief of the area, actual well bottom or screen elevations range from 32 to 610 feet above sea level). These wells are completed in various glacial units. Many wells are completed in sand lenses occurring within the Vashon till. Yields are somewhat limited but sufficient for domestic consumption. Wells are also completed in advance outwash deposits, which provide high yields to wells. In the areas where recessional outwash overlies till, such as near the Town of Granite Falls, wells are generally drilled no deeper than the bottom of the recessional outwash, not into underlying till. Recessional outwash deposits typically provide high yields to wells.

In general, there is no single continuous aquifer unit that supplies all ground water users in the proposed sole source aquifer area. Wells are usually completed in the first water producing zone encountered during drilling. All of the different types of glacial materials appear to contain at least some ground-water producing zones, and can supply water in varying quantities to varying numbers of wells. The occurrence of water-bearing zones is unsystematic, laterally and vertically, but there is no evidence that lower-permeability materials provide complete hydrologic separation between water bearing zones. Therefore, the entire thickness of unconsolidated glacial materials must be considered as a complex regional aquifer system.

Water obtained from the unconsolidated materials tends to be of satisfactory quality. In some instances, iron and manganese are found in elevated levels. Recently, naturally

occurring arsenic in the drinking water has shown up at elevated levels in several private wells completed in Tertiary volcanic bedrock, just west of Granite Falls. Wells that are completed in bedrock have probably drilled into a mineralized vein containing arsenic-bearing minerals, thereby showing elevated arsenic levels in the water.

Recharge of the proposed sole source aquifer area occurs largely through downward percolation of precipitation on the surface. Therefore, contamination from any source can enter the aquifer by the same route. Ground water is vulnerable to contamination from a wide variety of sources, such as pesticide application, leaking fuel or chemical storage tanks, agricultural runoff, animal wastes, septic systems, landfill leachate, and accidental spills of hazardous materials. Once the ground water becomes contaminated, its usefulness as a source of drinking water could be impaired or destroyed. Assuming that the technology to remove the contaminant, or contaminants, exists and is readily available, an increased expenditure of energy and funds could still be required to make the water useable again. If the technology is not available, or if the expense for decontamination is too high, the contaminated aquifer could become practically useless as a drinking water supply, and its usefulness for other purposes could be greatly impaired.

Should contamination of ground water of the Newberg Area occur, the only feasible water supply for about 2,450 people using ground water in the area would be lost. Existing wells could not be relocated because of probable interconnection between the ground-water producing zones in the various types of unconsolidated deposits. Deepening the wells would not provide an alternative source as the underlying bedrock yields limited quantities of usable water. Financial and institutional factors render development of all potential surface water sources of drinking water infeasible. Therefore, if ground water of the Newberg Area were to become contaminated, there would be no feasible alternative sources of drinking water available that could provide sufficient quantities of drinking water to all residents.

#### IV. Project Review

When the EPA Administrator published this determination for a sole or principal drinking water source, the consequence is that no commitment for federal financial assistance may be made if the Administrator finds that the federal financially assisted project may contaminate the aquifer through a

recharge zone so as to create a significant hazard to public health (Safe Drinking Water Act Section 1424(e), 42 U.S.C. 300h-3(e)). In many cases, these federal financially assisted projects may also be analyzed in a National Environmental Policy Act (NEPA) document, 42 U.S.C. 4332 (2)(c). All NEPA documents, as well as any other proposed Federal actions affecting an EPA program or responsibility, are required by Federal law to be reviewed and commented upon by the EPA Administrator.

To streamline EPA's review of the possible environmental impacts upon designated aquifers, when an action is analyzed in a NEPA document, the two reviews will be consolidated, and both authorities will be cited. The EPA review under the Safe Drinking Water Act of Federal financially assisted projects potentially affecting sole or principal source aquifers will be included in the EPA review of any NEPA document accompanying the same federally-assisted project Statement to the lead agency will be the vehicle for informing the lead agency of EPA's actions under section 1424(e).

#### V. Discussion of Public Comments

During the initial comment period, the Environmental Health Division of the Snohomish County Health District objected to sole source aquifer designation on technical grounds. The county agency charged that the original boundaries, as submitted by the petitioners, had no hydrogeological basis. Accordingly, the Environmental Health Division recommended that EPA conduct additional study to delineate the boundaries on a hydrogeological basis before taking further steps toward sole source designation. Shortly afterward, the Snohomish County Department of Public Works submitted a report on landfill siting criteria in an attempt to help EPA with its technical review process.

The EPA Region 10 Office of Ground Water agreed with Snohomish County that the designated area boundaries needed to coincide with the actual aquifer and recharge area boundaries. Accordingly, additional information was analyzed to determine the nature and extent of ground water resources within the Newberg area. This effort resulted in publishing a resource document which delineated the aquifer and recharge area boundaries based upon available hydrogeological information.

Upon distribution of the resource document, another public comment period was opened to provide an opportunity for comments on the revised



boundaries between July 23, 1987, and September 4, 1987. However, no public comments were received and a scheduled public meeting was cancelled due to a lack of interest.

#### VI. Summary

Today's action only affects the Newberg Area Aquifer in Snohomish County, Washington. This action provides a review process to insure that necessary ground-water protection measures are incorporated into federal financially-assisted projects.

Dated: September 21, 1987.

Ron Kreizenbeck,

Acting

[FR Doc. 87-22921 Filed 10-2-87; 8:45 am]

BILLING CODE 6560-50-M

### FEDERAL RESERVE SYSTEM

#### Federal Open Market Committee; Domestic Policy Directive of August 18, 1987

In accordance with § 217.5 of its rules regarding availability of information, there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on August 18, 1987.<sup>1</sup> The directive was issued to the Federal Reserve Bank of New York as follows:

The information reviewed at this meeting suggests on balance that economic activity is expanding at a moderate pace in the current quarter. In July, total nonfarm payroll employment rose considerably further; the increase included continuing large gains in the service-producing sector and a sizable advance in manufacturing. The civilian unemployment rate fell slightly further to 6.0 percent. Industrial production increased strongly in July after rising moderately on balance in the first half of the year. Consumer spending grew at a reduced pace earlier in the year but retail sales posted large increases in June and July. Housing starts were unchanged in July and remained at their reduced second-quarter level. Recent indicators of business capital spending point to some strength, particularly in equipment outlays. The rise in consumer and producer prices has been moderate in recent months, but for the year to date prices generally have risen more rapidly than in 1986, primarily reflecting sizable increases in prices of energy and non-oil imports. Wage increases have

remained relatively moderate in recent months.

In foreign exchange markets, the trade-weighted value of the dollar in terms of the other G-10 currencies was unchanged on balance since the meeting of the Committee on July 7. In the second quarter the merchandise trade deficit in current dollars was about the same as in the first quarter.

The monetary aggregates grew slowly in July. For 1987 through July, expansion of both M2 and M3 has been below the lower ends of the ranges established by the Committee for the year, while growth in M1 has been well below its pace in 1986. Expansion in total domestic nonfinancial debt has moderated this year. Most long-term interest rates have risen somewhat since that July meeting; in short-term markets, Treasury bill rates also have increased somewhat while private rates are little changed. Stock prices have risen substantially since the latest meeting.

The Federal Open Market Committee seeks monetary and financial conditions that will foster reasonable price stability over time, promote growth in output on a sustainable basis, and contribute to an improved pattern of international transactions. In furtherance of these objectives the Committee agreed at its meeting in July to reaffirm the ranges established in February for growth of 5½ to 8½ percent for both M2 and M3, measured from the fourth quarter of 1986 to the fourth quarter of 1987. The Committee agreed that growth in these aggregates around the lower ends of their ranges may be appropriate in light of developments with respect to velocity and signs of the potential for some strengthening in underlying inflationary pressures, provided that economic activity is expanding at an acceptable pace. The monitoring range for growth in total domestic nonfinancial debt set in February for the year was left unchanged at 8 to 11 percent.

For 1988, the Committee agreed on tentative ranges of monetary growth, measured from the fourth quarter of 1987 to the fourth quarter of 1988, of 5 to 8 percent for both M2 and M3. The Committee provisionally set the associated range for growth in total domestic nonfinancial debt at 7½ to 10½ percent.

With respect to M1, the Committee recognized that, based on experience, the behavior of that aggregate must be judged in the light of other evidence relating to economic activity and prices; fluctuations in M1 have become much more sensitive in recent years to changes in interest rates, among other factors. Because of this sensitivity, which has been reflected in a sharp

slowing of the decline in M1 velocity over the first half of the year, the Committee again decided at the July meeting not to establish a specific target for growth in M1 over the remainder of 1987 and no tentative range was set for 1988. The appropriateness of changes in M1 this year will continue to be evaluated in the light of the behavior of its velocity, developments in the economy and financial markets, and the nature of emerging price pressures. The Committee welcomes substantially slower growth of M1 in 1987 than in 1986 in the context of continuing economic expansion and some evidence of greater inflationary pressures. The Committee in reaching operational decision over the balance of the year will take account of growth in M1 in the light of circumstances then prevailing. The issues involved with establishing a target for M1 will be carefully reappraised at the beginning of 1988.

In the implementation of policy for the immediate future, the Committee seeks to maintain the existing degree of pressure on reserve positions. Somewhat greater reserve restraint would, or slightly lesser reserve restraint might, be acceptable depending on indications of inflationary pressures, the strength of the business expansion, developments in foreign exchange markets, as well as the behavior of the aggregates. This approach is expected to be consistent with growth in M2 and M3 over the period from June through September at annual rates of around 5 percent. Growth in M1, while picking up from recent levels, is expected to remain well below its pace during 1986. The Chairman may call for Committee consultation if it appears to the Manager for Domestic Operations that reserve conditions during the period before the next meeting are likely to be associated with a federal funds rate persistently outside a range of 4 to 8 percent.

By order of the Federal Open Market Committee, September 28, 1987.

Normand Bernard,

Assistant Secretary, Federal Open Market Committee.

[FR Doc. 87-22858 Filed 10-2-87; 8:45 am]

BILLING CODE 6210-01-M

#### Formation of; Acquisitions by; and Mergers of Bank Holding Companies; Ameritrust Corp., et al.

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12

<sup>1</sup> Copies of the Record of policy actions of the Committee for the meeting of August 18, 1987, are available upon request to The Board of Governors of the Federal Reserve System, Washington, DC 20551.



CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than October 22, 1987.

**A. Federal Reserve Bank of Cleveland** (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. *AmeriTrust Corporation*, Cleveland, Ohio; to acquire 100 percent of the voting shares of Midwest National Bank, Indianapolis, Indiana. In connection with this application, A T Acquisition Corporation, Cleveland, Ohio, has applied to become a bank holding company by merging with AmeriTrust Indiana Corporation, Indianapolis, Indiana, and thereby indirectly acquiring Midwest National Bank, Indianapolis, Indiana.

2. *Cardinal Bancshares, Inc.*, Lexington, Kentucky; to become a bank holding company by acquiring 100 percent of the voting shares of Union Bank and Trust Company, Irvine, Kentucky.

3. *Fifth Third Bancorp.*, Cincinnati, Ohio; to merge with First Bancorporation of Batesville, Batesville, Indiana.

**B. Federal Reserve Bank of Richmond** (Lloyd W. Bostian, Jr., Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *First Sun Capital Corporation*, Columbia, South Carolina; to become a bank holding company by acquiring 100 percent of the voting shares of Columbia Bancorp, Inc., Columbia, South Carolina, and thereby indirectly acquire Republic National Bank, Columbia, South Carolina.

**C. Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street NW., Atlanta, Georgia 30303:

1. *Alabama National Bancorporation*, Ashland, Alabama; to acquire 100 percent of the voting shares of Gulf National Bank, Orange Beach, Alabama, a *de novo* bank.

**D. Federal Reserve Bank of Chicago** (David S. Epstein, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Lincoln Financial Corporation*, Fort Wayne, Indiana; to acquire 100 percent of the voting shares of Harbor County Banking Corporation, Three Oakes, Michigan, and thereby indirectly acquire Heritage Bank, Oronko Township, Michigan, and Bank of Three Oakes, Three Oakes, Michigan.

Board of Governors of the Federal Reserve System, September 28, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-22859 Filed 10-2-87; 8:45 am]

BILLING CODE 6210-01-M

#### **Applications to Engage de Novo in Permissible Nonbanking Activities; Beverly Bancorporation, Inc., et al.**

The companies listed in this notice have filed an application under § 225.33(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to comment or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the

evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 23, 1987.

**A. Federal Reserve Bank of Chicago** (David S. Epstein, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Beverly Bancorporation, Inc.*, Chicago, Illinois; to engage *de novo* in making and servicing of loans pursuant to § 225.25(b)(1) of the Board's Regulation Y.

**B. Federal Reserve Bank of Minneapolis** (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Dunn County Bankshares, Inc.*, Menomonie, Wisconsin; to engage *de novo* through its subsidiary, Premium Finance Corporation, Eau Claire, Wisconsin, in providing funds to persons, organizations and businesses in the form of loans to pay their insurance premiums pursuant to § 225.25(b)(1) of the Board's Regulation Y. These activities will be conducted in State of Wisconsin.

Board of Governors of the Federal Reserve System, September 29, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-22860 Filed 10-2-87; 8:45 am]

BILLING CODE 6210-01-M

#### **Formations of; Acquisitions by; and Mergers of Bank Holding Companies; First Peoples Financial Corp., et al.**

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a



written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than October 21, 1987.

**A. Federal Reserve Bank of Philadelphia** (Thomas K. Desch, Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105:

1. *First Peoples Financial Corporation*, Haddon Township, New Jersey; to acquire up to 24.81 percent of the voting shares of First Bank of Philadelphia, Philadelphia, Pennsylvania. Comments on this application must be received by October 26, 1987.

**B. Federal Reserve Bank of Chicago** (David S. Epstein, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *First Financial Corporation*, Terre Haute, Indiana; to merge with FSB Corporation, Sullivan, Indiana, and thereby indirectly acquire Farmer State Bank of Sullivan, Sullivan, Indiana.

**C. Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *North Arkansas Bancshares, Inc.*, Jonesboro, Arkansas; to acquire 100 percent of the voting shares of First State Bank of Newport, Arkansas.

Board of Governors of the Federal Reserve System, September 29, 1987.

**James McAfee,**

*Associate Secretary of the Board.*

[FR Doc. 87-22861 Filed 10-2-87; 8:45 am]

BILLING CODE 6210-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Family Support Administration

#### Reallotment of Funds for FY 1986; Low Income Energy Assistance Program (LIHEAP)

**AGENCY:** Family Support Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** Notice of Determination of Funds Available for Reallotment. In accordance with section 2607(b)(1) of the Omnibus Budget Reconciliation Act of 1981, (42 U.S.C. 8621), as amended, a notice was published in the *Federal Register* on July 1, 1987 announcing the Secretary's preliminary determination that \$16,706, in FY 1986 LIHEAP funds may be reallotted. After further evaluation, the Secretary has

determined that no funds from FY 1986 would be reallotted. This determination was based on the fact that a large number of grantees would receive grant awards of less than one dollar (\$1.00). Other grantees would receive grant awards of less than one hundred dollars (\$100.00). It would not be cost effective to reallot these small amounts of funds.

#### FOR FURTHER INFORMATION CONTACT:

H. Gray Mounts, Deputy Associate Administrator for Grants Management, Family Support Administration, Mary E. Switzer Building, Room 2220, 330 C Street SW, Washington, DC 20201; telephone (202) 245-0906.

Wayne A. Stanton,  
*Administrator*

Date: September 29, 1987.

[FR Doc. 87-22931 Filed 10-2-87; 8:45 am]

BILLING CODE 4150-04-M

### Public Health Service

#### Intent To Grant an Exclusive Patent License Extension; Medpacific Corp.

Pursuant to § 6.3 of 45 CFR Part 6 and 37 CFR Part 404, the Assistant Secretary for Health of the Department of Health and Human Services hereby gives notice of intent to grant an extension of an exclusive license for the life of the patent issued to Medpacific Corporation to make, use, and sell an invention of Drs. Michael D. Stern and Donald L. Lappe entitled, "Method of and Apparatus for Measurement of Blood Flow Using Coherent Light," for which United States Patent No. 4,109,647 issued August 9, 1978. A copy of the patent may be obtained upon written request submitted to Mr. Leroy B. Randall, Chief, Patent Branch, Department of Health and Human Services, c/o National Institutes of Health, Room 5A03, Westwood Building, Bethesda, Maryland 20892.

The Department of Health and Human Services will grant an extension of the exclusive license on the basis of information already submitted to the Department, unless information submitted by interested parties to the above address within sixty (60) days of this Notice indicates that the grant is not in the public interest. Any such submittals may include license applications and development plans indicating how the submitter proposes to develop and market the product should it be granted a nonexclusive license.

The Assistant Secretary for Health of the Department of Health and Human Services will review all written responses to this Notice.

Authority: 45 CFR 6.3 and 37 CFR 404.7

Robert E. Windom,

*Assistant Secretary for Health.*

Dated: September 23, 1987.

[FR Doc. 87-22932 Filed 10-2-87; 8:45 am]

BILLING CODE 4160-17-M

### President's Council on Physical Fitness and Sports; Meeting

**AGENCY:** Office of the Assistant Secretary for Health, HHS.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the President's Council on Physical Fitness and Sports. This notice also describes the functions of the Council. Notice of this meeting is required under the National Advisory Committee Act.

**DATE:** October 15, 1987, 9:00 a.m. to 2:00 p.m.

**ADDRESS:** Rayburn House Office Building, Room 2253, Independence Avenue & South Capitol Street, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ash Hayes, Ed.D., Executive Director, President's Council on Physical Fitness and Sports, 450 Fifth Street, NW., Suite 7103, Washington, DC 20001, Telephone: (202) 272-3421.

**SUPPLEMENTARY INFORMATION:** The President's Council on Physical Fitness and Sports operates under Executive Order #12345, as amended, extended by Executive Order #12534 dated September 30, 1985, further amended by Executive Order #12539 dated December 3, 1985. The functions of the Council are: (1) To advise the President and Secretary concerning progress made in carrying out the provision of the Executive Order and recommending to the President and Secretary, as necessary actions to accelerate progress; (2) advise the Secretary on matters pertaining to the ways and means of enhancing opportunities for participation in physical fitness and sports activities; (3) advise the Secretary on State, local, and private actions to extend and improve physical activity programs and services.

The Council will hold this meeting to apprise the Council members of the national program of physical fitness and sports, to report on on-going Council programs, and to plan for future directions.



Date: September 29, 1987.

Ash Hayes.

*Executive Director, President's Council on Physical Fitness and Sports.*

[FR Doc. 87-22922 Filed 10-2-87; 8:45 am]

BILLING CODE 4160-17-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Marine Mammal Permits; Receipt of Application

The public is invited to comment on the following application for renewal of a permit to conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*) and the regulations governing marine mammals and endangered species (50 CFR Parts 17 and 18).

*Applicant Name:* Chief, Marine Mammal Section, U.S. Fish & Wildlife Service, National Ecology Center, San Simeon, California 93452.

*File No.* PRT-684532.

*Type of Permit:* Scientific Research.

*Name of Animals:* West Indian manatee (*Trichechus manatus*) about 100 from the wild and about 15 in captivity annually.

*Type of Activity to be Authorized:* (a) Radio tag, using either VHF or PTT tags, and/or tetracycline mark; (b) attach peduncle tags or free-floating tether tags; (c) tail-notch free ranging, human-accustomed manatees; (d) freeze-brand injured and rescued manatees; (e) carry out nonharmful studies on rehabilitation; (f) collect dead and injured animals; and (g) export parts of salvaged dead manatees.

The purpose of this application is to continue to conduct research to secure information on manatee movements and reproductive biology. This information is important in developing sound management plans necessary to help recover the species. The permittee has been conducting the described research activities since October of 1981, and all techniques have proven safe for the manatee.

*Location of Activity:* Southeastern U.S. and Puerto Rico.

*Period of Activity:* November 1987 through November 1990.

Concurrent with the publication of this notice in the *Federal Register*, the Federal Wildlife Permit Office is forwarding copies of this application to the Marine Mammal Commission and

the Committee of Scientific Advisors for their review.

Written data or comments, requests for copies of the complete application, or requests for a public hearing on this application should be submitted to the Director, U.S. Fish and Wildlife Service (FWPO), 1000 North Glebe Road, Room 611, Arlington, Virginia 22201, within 30 days of the publication of this notice. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such hearing is at the discretion of the Director.

Documents submitted in connections with the above application are available for review during normal business hours (7:45 am to 4:15 pm) in Room 601 N. Glebe Road, Arlington, Virginia.

Dated: September 30, 1987.

R.K. Robinson,

*Chief, Branch of Permits, Federal Wildlife Permit Office.*

[FR Doc. 87-22942 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-55-M

### Bureau of Land Management

[AK-919-08-4213-02]

#### General Meeting of the Northern Alaska Advisory Council; Fairbanks Support Center

A general meeting of the Northern Alaska Advisory Council, open to the public, will be held to discuss the following topics:

1. Utility Corridor Draft Resource Management Plan/Environmental Impact Statement.
2. Cumulative environmental impact statements on the effects of placer mining on the watersheds of the Fortymile, Tolovana and Chatanika Rivers and Birch, Beaver and Goldstream Creeks.
3. Briefings on current local BLM programs.

The meeting will be from 8:30 a.m. to 5 p.m. on Thursday, November 5, 1987, at BLM's Fairbanks Support Center, 1541 Gaffney Road, on Fort Wainwright.

Public comments on the agenda items will be received by the Council from 3 to 4 p.m. Oral comments may be limited by time and it is recommended that public comments be submitted in writing at the meeting.

For further information contact the Public Affairs Office, Bureau of Land Management, 1541 Gaffney Road,

Fairbanks, Alaska 99703, telephone (907) 356-2345.

John R. Barnes,

*Acting Designated District Manager, Northern Alaska/Kobuk District.*

September 25, 1987.

[FR Doc. 87-22752 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-84-M

[UT 080-07-4830-12]

#### Utah Vernal District Advisory Council; Meeting

**AGENCY:** Bureau of Land Management.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given in accordance with Pub. L. 92-463, that a meeting of the Vernal District Advisory Council will be held on Thursday, November 5, 1987.

The meeting will begin at 6:30 p.m. and will be held in the conference room of the BLM Office located at 170 South 500 East, Vernal, Utah.

Agenda items shall include:

- Update on Brown's Park/Little Hole Road
- Proposed Cooperative Horse Management Plan with the Ute Tribe
- Inspection & Enforcement Oil & Gas Cooperative Agreement with the Ute Tribe
- Potential Resource Management Plan for the Diamond Mountain Resource Area
- Feedback on Draft Off-Road Vehicle Environmental Assessment
- Update on Jarvie Site Plan
- Brown's Park Deer Study Surprises
- Feedback on the District's Demonstration Riparian Management Plan
- Agricultural Trespass
- Items At Large From Council Members
- Public Comments or Reading of Public Comments, if any.

Advisory Board Meetings are open to the public. Interested persons desiring to make comments must notify the District Manager no later than close of business Tuesday, November 3rd. In the event of several commenters, the District Manager or Council Chairperson may establish a per person comment time limit.

Date: September 24, 1987.

David E. Little,

*Vernal District Manager.*

[FR Doc. 87-22894 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-DQ-M



**National Park Service****Information Collection Submitted for OMB Review Under the Paperwork Reduction Act**

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comment and suggestions on the requirement should be made directly to the Bureau clearance officer and the Office of Management and Budget reviewing official, Washington, DC 20503, Telephone 202-395-7340.

*Title:* Land and Water Conservation Fund-On-Site Inspection Report.

*Abstract:* These reports are used to determine project eligibility for funding and insure compliance by grantees with all applicable laws and regulations.

*Bureau Form Number:* None.

*Frequency:* On Occasion.

*Description of Respondents:* State and local governments.

*Annual Responses:* 940.

*Annual Burden Hours:* 470.

*Bureau Clearance Officer:* Russell K. Olsen, 523-5133.

*Russell K. Olsen,*

*Information Collection Clearance Officer.*

[FR Doc. 87-22899 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-70-M

**Information Collection Submitted for OMB Review Under the Paperwork Reduction Act**

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comment and suggestions on the requirement should be made directly to the Bureau clearance officer and the Office of Management and Budget reviewing official, Washington, DC 20503, Telephone 202-395-7340.

*Title:* Land and Water Conservation Fund—Program Performance Report.

*Abstract:* Grantees are required to submit performance reports which

describes the status of the work required under the project scope.

*Bureau Form Number:* None.

*Frequency:* On Occasion.

*Description of Respondents:* State or local governments.

*Annual Responses:* 2,030.

*Annual Burden Hours:* 2,030.

*Bureau Clearance Officer:* Russell K. Olsen, 523-5133.

*Russell K. Olsen,*

*Information Collection Clearance Officer.*

[FR Doc. 87-22900 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-70-M

**Information Collection Submitted for OMB Review Under the Paperwork Reduction Act**

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comment and suggestions on the requirement should be made directly to the Bureau clearance officer and the Office of Management and Budget reviewing official, Washington, DC 20503, Telephone 202-395-7340.

*Title:* Land and Water Conservation Fund—Description and Notification Form.

*Abstract:* Data is used to Monitor Project Progress and Analyze trends in L&WCF Assistance.

*Bureau Form Number:* 10-903.

*Frequency:* On Occasion.

*Description of Respondents:* State or local governments.

*Annual Responses:* 1,880.

*Annual Burden Hours:* 470.

*Bureau Clearance Officer:* Russell K. Olsen, 523-5133.

*Russell K. Olsen,*

*Information Collection Clearance Officer.*

[FR Doc. 87-22901 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-70-M

**Information Collection Submitted for OMB Review Under the Paperwork Reduction Act**

The Proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and

explanatory materials may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comment and suggestions on the requirement should be made directly to the Bureau clearance officer and the Office of Management and Budget reviewing official, Washington, DC 20503, Telephone 202-395-7340.

*Title:* Land and Water Conservation Fund—Project Agreement.

*Abstract:* Sets forth the obligations assumed by the State through its acceptance of Federal assistance including the rules and regulations applicable to the conduct of a project under the L&WCF Act.

*Bureau Form Number:* 10-902.

*Frequency:* On Occasion.

*Description of Respondents:* State and local governments.

*Annual Responses:* 1,880.

*Annual Burden Hours:* 1,880.

*Bureau Clearance Officer:* Russell K. Olsen, 523-5133.

*Russell K. Olsen,*

*Information Collection Clearance.*

[FR Doc. 87-22902 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-70-M

**Information Collection Submitted for OMB Review Under the Paperwork Reduction Act**

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comment and suggestions on the requirement should be made directly to the Bureau clearance officer and the Office of Management and Budget reviewing official, Washington, DC 20503, Telephone 202-395-7340.

*Title:* Land and Water Conservation Fund—State Annual Report.

*Abstract:* The State Annual Report is used to fulfill the L&WCF Act requirement that each State evaluate its program annually.

*Bureau Form Number:* None.

*Frequency:* Annually.

*Description of Respondents:* State or local governments.

*Annual Responses:* 55.

*Annual Burden Hours:* 1,750.



Bureau Clearance Officer: Russell K. Olsen, 523-5133.

Russell K. Olsen,

Information Collection Clearance Officer.

[FR Doc. 87-22903 Filed 10-2-87; 8:45 am]

BILLING CODE 4310-70-M

## INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

### Agency for International Development

#### Board for International Food and Agricultural Development; Meeting

Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given of the Eighty-Fourth Meeting of the Board for International Food and Agricultural Development (BIFAD) on October 8 and 9, 1987.

The purposes of the Meeting are: (1) To discuss the trends and issues that affect Participant Training; (2) to hear a report based on a survey of project records maintained by universities; (3) to receive a Budget Panel report; (4) to hear an overview on the status of Title XII Support Grants Programs, including responses from Title XII representatives on universities' perceptions and concerns.

The October 8, 1987 portion of the Meeting will be held from 1:15 p.m. until 4:30 p.m. and October 9 continuation of the Meeting will be held from 8:30 a.m. until 11:45 a.m. The October 8th portion of the Meeting will be held in Room 1205 New State and the October 9th portion of the Meeting will be held in Room 1406 New State, 2201 C Street, Washington, DC 20523. Any interested person may attend, and may present oral statements in accordance with procedures established by the Board, and the extent the time available for the meeting permits.

Curtis Jackson, Bureau of Science and Technology, Office of University Relations, Agency for International Development is designated as A.I.D. Advisory Committee Representative at this Meeting. It is suggested that those desiring further information write to Dr. Jackson, in care of the Agency for International Development, Room 309, Washington, DC 20523, or telephone him on (703) 235-8929.

Date: September 28, 1987.

Charles D. Ward,

Deputy Director, BIFAD.

[FR Doc. 87-23096 Filed 10-2-87; 8:45 am]

BILLING CODE 6116-01-M

## INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31113]

### Acquisition and Operation Exemption; Certain Lines of the Atchison, Topeka and Santa Fe Railway Co. and TP&W Acquisition Corp.

TP&W Acquisition Corporation, a noncarrier, has filed a notice of exemption to acquire and operate certain properties of The Atchison, Topeka and Santa Fe Railway Company (ATSF). The properties consist of ATSF's line between Lomax, IL (milepost 206.1L), and Logansport, IN (milepost 0.0), including ATSF's connecting line between East Peoria, IL (NW milepost 410.5), and Morton, IL (milepost 48.30), a total distance of 281.5 miles, together with ancillary overhead trackage rights over ATSF's connecting line between Lomax, IL (milepost 218.5), and Fort Madison, IA (milepost 234.0), a total distance of 15.5 miles. Any comments must be filed with the Commission and served on Frank H. Blatz, Jr., Abrams Blatz, Dalto, Gran, Kendricks and Reina, 1550 Park Avenue, Post Office Drawer D, South Plainfield, NJ 07080, and Dennis W. Wilson, the Atchison, Topeka and Santa Fe Railway Company, 80 E. Jackson Blvd., Chicago, IL 60604.

The notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.<sup>1</sup>

Decided: September 16, 1987.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 87-22809 Filed 10-2-87; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 31088]

### Purchase; Illinois Central Gulf Railroad Co. Line—Between Fulton, KY and Haleyville, AL; Southern Railway Co. and Norfolk Southern Corp.

AGENCY: Interstate Commerce Commission.

ACTION: Request for comments.

SUMMARY: Southern Railway Company (Southern), Norfolk Southern

<sup>1</sup> By decision entered September 16, 1987, the Commission denied a petition, filed by Local 1815 of the United Transportation Union, requesting a stay of the effective date of the notice of exemption.

Corporation (NS), and Illinois Central Gulf Railroad Company (ICG) have notified the Commission of their intent to file an application seeking Commission approval and authorization, under 49 U.S.C. 11343 *et seq.*, for Southern to acquire ICG's line of railroad between Fulton, KY and Haleyville, AL, a distance of approximately 199 miles. A related application will be filed seeking approval and authorization for Southern to acquire trackage rights over ICG between Fulton, KY, and Centralia, IL, a distance of approximately 154 miles. We acknowledged their notice of intent in our decision served August 25, 1987 and published in the Federal Register on August 26, 1987, at 52 FR 32184. Applicants plan to file their applications on or about October 1, 1987.

Applicants have requested the Commission to adopt an expedited schedule in this proceeding. Under that schedule, any and all responsive evidence and verified statements would be filed within 45 days of acceptance of the primary application, applicants' reply evidence and supporting verified statements would be filed 15 days thereafter (at which time the evidentiary proceeding is completed), and a final decision will be issued by the 45th day after the evidentiary proceeding is completed.

Applicants' proposed schedule contains substantially shorter time periods than those provided in the Commission's rules at 49 CFR 1180.4 (d) and (e). The rules provide, among other things, after the Commission accepts the primary application in a significant transaction, (1) all responsive applications must be filed within 60 days of that acceptance, (2) the evidentiary proceeding must be completed within 180 days of acceptance, and (3) a final decision must be issued 90 days after conclusion of the evidentiary phase. In support of their proposal, applicants assert that the expeditious filing of evidence is encouraged by 49 U.S.C. 11345(c) and that their "case in chief" approach where all parties would file evidence at the close of the comment period has been adopted by the Commission in its motor carrier consolidation rules and has received judicial approval.

As yet, we have no indication of the response to this procedural request. Moreover, respondents should be able to review the application before taking a position on a schedule. Therefore, we will invite interested parties to comment on the merits of applicants' proposal.

DATES: Comments on applicants' proposed schedule must be submitted by



15 days after filing of the application. Applicants' comments are due 10 days thereafter.

**ADDRESSES:** An original and 15 copies of comments must refer to Finance Docket No. 31088 and should be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

**FOR FURTHER INFORMATION CONTACT:**

Paul Nishimoto, (202) 275-7888

or

Joseph H. Dettmar, (202) 275-7245  
TDD for hearing impaired: (202) 275-1721.

**SUPPLEMENTARY INFORMATION:**

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or call (202) 289-4357 (assistance for the hearing impaired is available through TDD services (202) 275-1721) or by pickup from Dynamic Concepts in Room 2229 at Commission headquarters.

Decided: September 21, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simons. Vice Chairman Lamboley, joined by Commissioner Simmons, concurred with a separate expression.

Noreta R. McGee,  
Secretary.

[FR Doc. 87-22807 Filed 10-2-87; 8:45 am]

BILLING CODE 7035-01-M

[Amdt. No. 9]

**Section 5a Application No. 45;<sup>1</sup>  
Niagara Frontier Tariff Bureau, Inc.  
Agreement**

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of decision and request for comment.

**SUMMARY:** Niagara Frontier Tariff Bureau, Inc. (Niagara), has filed, pursuant to section 14(e) of the Motor Carrier Act of 1980 (MCA), an application for approval of its ratemaking agreement<sup>2</sup> under 49 U.S.C.

10706(b). Since several modifications are required before the agreement receives final approval, and because of the new and complex questions involved in determining whether the agreement is consistent with the 1980 Act and the deviation implementing it, the Commission has decided to solicit public comment on its interpretation and application of specific rate bureau provisions. Copies of Niagara's proposed amended agreements are available for public inspection and copying at the Office of the Secretary, Interstate Commerce Commission, Washington, DC, 20423, and from Niagara's representative: Robert G. Gawley, Attorney, P.O. Box 184, Buffalo, NY 14221.

Additional information is in the Commission decision. Copies may be obtained from Office of the Secretary, Room 2215, Interstate Commerce Commission, Washington, DC 20423, or call (202) 275-7428 (assistance for the hearing impaired is available through TDD services (202) 275-1721) or by pickup from Dynamic Concepts, Inc. in Room 2229 at Commission headquarters.

**DATE:** Comments from interested persons are due November 4, 1987. Replies are due 15 days thereafter.

**ADDRESS:** An original and 10 copies, if possible, of comments referring to Section 5a Application No. 45 should be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

**FOR FURTHER INFORMATION CONTACT:**

Paul Grossman, (202) 275-7976, or Andrew Lyon, (202) 275-7691, (TDD for hearing impaired: (202) 275-1721).

**SUPPLEMENTARY INFORMATION:** We have provisionally approved Niagara's agreement as consistent with 49 U.S.C. 10706(b) and *Motor Carrier Rate Bureaus—Implementation of Pub. L. 96-296, 364 I.C.C. 464 (1980)* and 364 I.C.C. 921 (1981) (*Rate Bureau*), subject to certain conditions and modifications in the following subject areas: Identification and description of member-carriers; right of independent action; employee docketing; open meetings; quorum standards; final disposition of cases; single-line rates; general increases and decreases; and zone of rate freedom and released rates. We have also offered comments and imposed requirements concerning the agreement generally. Niagara has been directed to file a revised agreement conforming to the imposed conditions

within 120 days of service of the decision.

In light of the complexity of interpretation involved in determining whether the agreement is consistent with the MAC and the *Rate Bureau* case, *supra*, we request applicant and other interested parties to comment on our interpretation of the controlling statutory and administrative criteria and their application to Niagara's agreement. In addition, comments may be filed on our previous determination that the interbureau agreement between Niagara and Southern Motor Carriers Rate Conference, Inc., contained in the agreement is not a separate collective ratemaking agreement subject to the terms of the *Rate Bureau* case, *supra*.

A copy of any comments filed with the Commission must also be served on Niagara, which will have 15 days from the expiration of the comment period to reply. These comments will be considered in conjunction with our review of the modifications that Niagara must submit to the Commission as a condition to final approval of its agreement.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

**Authority:** 49 U.S.C. 10321 and 10706 and 5 U.S.C. 553.

Decided: September 25, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Andre concurred with a separate expression.

Noreta R. McGee,  
Secretary.

[FR Doc. 87-22925 Filed 10-2-87; 8:45 am]

BILLING CODE 7035-01-M

**DEPARTMENT OF JUSTICE**

**Drug Enforcement Administration**

[Docket No. 86-91]

**Revocation of Registration;  
Cumberland Prescription Center, Inc.**

On November 7, 1986, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Cumberland Prescription Center, Inc. (Respondent) of 1000 Mendon Road, Cumberland, Rhode Island 02864 proposing to revoke the pharmacy's DEA Certificate of Registration AC6283193 and to deny any pending applications for the renewal of such registration. The Order to Show Cause alleged that the continued

<sup>1</sup> Section 5 was recodified as Section 10706.

<sup>2</sup> Niagara's agreement contains a separate agreement between Niagara and Southern Motor Carriers Rate Conference, Inc. (SMCRC) which contains provisions corresponding to those in Niagara's main amended agreement. In Section 5a Application No. 46 (Amendment No. 15), *Southern Motor Carriers Rate Conference, Inc., Agreement* (not printed), served February 12, 1985, and May 27, 1987, the Commission concluded that an identical interbureau agreement submitted by SMCRC as part of its application was not a separate collective ratemaking agreement subject to the terms of Ex

Parte No. 297 (Sub-No. 5), *Motor Carrier Rate Bureaus—Implementation of Pub. L. 96-296, 364 I.C.C. 464 (1980)*.



registration of the pharmacy would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f) and 824(a)(4). Subsequent to the initiation of proceedings to revoke the pharmacy's DEA Certificate of Registration, Respondent pharmacy submitted a new application for registration on March 27, 1987. The Order to Show Cause was amended to include the proposed denial of this application.

By letter dated December 8, 1986, Respondent's counsel requested a hearing on the issues raised by the Order to Show Cause and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following prehearing proceedings, a hearing was held in Boston, Massachusetts on April 30, 1987. On July 8, 1987, Judge Bittner issued her opinion and recommended ruling, findings of fact, conclusions of law and decision. Pursuant to 21 CFR 1316.66, Government counsel filed exceptions to the Administrative Law Judge's recommended ruling. On August 17, 1987, Judge Bittner transmitted the record in this proceeding, including the Government's exceptions, to the Administrator. The Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order in this matter based upon findings of fact and conclusions of Law as hereinafter set forth.

The Administrative Law Judge found that Respondent pharmacy has been in existence since about 1975. Until March of 1987, Michael Arouth was the president, 50% shareholder and managing pharmacist of Respondent pharmacy. His wife, Phyllis has been a 50% shareholder of the pharmacy since its inception.

In 1964, while working as a pharmacist at another pharmacy, Michael Arouth pled guilty in a Rhode Island court to two counts of delivery of barbiturates. As a result of this conviction, the Rhode Island Board of Pharmacy placed Michael Arouth's pharmacist license on probation for a period of five years.

Beginning in 1985, the Cumberland Police Department received information that individuals, including drug addicts, were obtaining drugs from Respondent pharmacy without presenting a prescription to the pharmacist. On August 5, 1986, a cooperating individual contacted a detective of the Cumberland Police Department and indicated that for 10 years, beginning when she was 16 or 17, Michael Arouth provided her with controlled substances, in exchange for sexual favors, including posing nude for photographs. She never presented Michael Arouth with a prescription for

these drugs. The cooperating individual told the detective that Michael Arouth had similar arrangements with other women. She further stated that Arouth told her that in order to account for the drugs he was illegitimately dispensing, he received more controlled substances than he ordered from salesmen of drug distributors and then recorded only the amounts he had ordered. In addition, when filling orders for nursing homes, Michael Arouth would take some of the medication from the vials and replace it with water.

On August 5, 1986, the cooperating individual telephoned Michael Arouth from the Cumberland Police Department and indicated to him that she wanted some controlled substances, needles and syringes. She then went to Respondent pharmacy, at which time Michael Arouth gave her various controlled substances in an unmarked vial and an envelope, two needles and syringes. She did not present Michael Arouth with a prescription for the controlled substances nor did she pay him for the drugs. The Administrative Law Judge concluded that these substances were not dispensed for a legitimate medical purpose.

The next day, August 6, 1986, the cooperating individual again telephone Michael Arouth to arrange another meeting at the pharmacy. During the conversation, Michael Arouth told the cooperating individual that the "heat was on" and therefore, he would not give her any more drugs, but would give her money so she could obtain drugs elsewhere. The cooperating individual then went to Respondent pharmacy and Michael Arouth gave her \$20.00 or \$25.00, but did not give her any controlled substances on this occasion.

On August 8, 1986, officers of the Cumberland Police Department executed a search warrant at Respondent pharmacy. During the course of the search, the officers seized a large quantity of assorted controlled substances located throughout the pharmacy. These drugs were in unlabelled vials with three or four different types of drugs in one vial. In addition, the officers found large quantities of drugs obtained from various nursing homes and pharmacies in Rhode Island, as shown by the labels on the vials containing the drugs and by documents accompanying them. The officers also seized photographs of women posing nude throughout the pharmacy. One of the women appearing in the photographs was the cooperating individual. During a subsequent search of the pharmacy, officers seized the contents of a safe located in the pharmacy. Among other things, there

was a tablet of Quaalude, a Schedule I controlled substance.

During the search, the officers looked at Respondent's prescription files, but were unable to locate any prescriptions written for the cooperating individual. The prescriptions revealed that certain individuals were regularly having prescriptions for controlled substances filled at Respondent pharmacy.

On August 8, 1986, Michael Arouth was arrested by the Cumberland Police Department and charged with four felony counts of delivery of phentermine, diazepam, oxycodone, and delivery of needles and syringes in violation of the laws of the State of Rhode Island.

On October 22, 1987, DEA investigators conducted an inspection of Respondent to insure that required records relating to controlled substances were being maintained and to conduct an accountability audit. Two audits were conducted of selected Schedule II controlled substances, one covering the period February 6, 1985, through October 22, 1986, and the other covering the period October 2, 1984, through October 22, 1986. These audits revealed coverages of the majority of the substances audited; in other words, Respondent could account for more of the controlled substances than it was held accountable for.

DEA investigators also conducted an audit of selected Schedules III, IV and V controlled substances for the period October 22, 1985, through October 22, 1986, which revealed significant shortages of all but one of the substances audited. It is likely that the shortages of the Schedules III, IV, and V substances were even greater than the audit reflected since a zero inventory balance, which assumes that no drugs were on hand at the beginning of the audit period, was used. Respondent was not held accountable for any substances in stock on October 22, 1985. The shortages and overages revealed by the audits indicate a violation of 21 U.S.C. 842(a)(5).

On March 9, 1987, the State of Rhode Island Board of Pharmacy entered into a Consent Agreement with Michael Arouth pursuant to which, the latter agreed not to practice pharmacy pending the disposition of the criminal charges against him. The Consent Agreement specifically stated that the pharmacy could remain open under a new registrant, required to be registered as a pharmacist in Rhode Island and approved by the Pharmacy Board to serve as store registrant. The agreement further required that Michael Arouth disassociate himself from the daily



operation of the pharmacy, and provided that if he engaged in the practice of pharmacy during the term of the agreement, his registration as a pharmacist would be automatically suspended. The agreement does not, however, provide any sanctions against Respondent pharmacy should Michael Arouth fail to comply with its terms.

On March 13, 1987, Michael Arouth transferred his fifty percent share of the corporation to his daughter, with no consideration being given for such shares. His daughter is not a registered pharmacist and she rarely goes into the pharmacy.

The Administrative Law Judge found that Michael Arouth still works as a clerk in the store and has no other employment. In addition, the new managing pharmacist was hired by Michael Arouth.

The Administrative Law Judge concluded that the continued registration of Respondent pharmacy would be inconsistent with the public interest. Michael Arouth's conduct in dispensing controlled substances in exchange for sexual favors and the pharmacy's failure to keep accurate records clearly support such a conclusion.

The Administrator of the Drug Enforcement Administration has consistently, revoked, suspended or denied the registration of pharmacies based upon the controlled substance handling practices of the pharmacy's owner, majority shareholder, officer, managing pharmacist or other key employee. See *Unarex of Plymouth Road, d.b.a. Motor City Prescription and Unarex of Dearborn, d.b.a. Motor City Prescription Center*, Docket Nos. 84-1 and 84-2, 50 Fed. Reg. 7077 (1985); *Bourne Pharmacy, Inc.*, Docket No. 83-22, 49 FR 32816 (1984); *Big T Pharmacy*, Docket No. 80-34, 48 FR 51830 (1982), and cases cited therein.

Respondent contends that Michael Arouth is no longer a corporate owner of the pharmacy and no longer has anything to do with the handling of controlled substances at the pharmacy; therefore, Respondent's DEA Certificate of Registration should not be revoked. As stated in *Big T Pharmacy*, supra, "[t]he law will not be read so as to permit corporate registrants to evade a congressionally mandated sanction by permitting convicted felons to shed their various interests and offices \* \* \* thus leaving the pharmacy to escape its responsibility." The Administrative Law Judge concluded that Michael Arouth is still very much a part of the operation of Respondent. He continues to work on Respondent's premises and has no other employment. Neither of the two current

owners of the corporation works in the Pharmacy full-time. Further, Michael Arouth continues to benefit financially from any profits from the business through his wife's ownership interest.

The Administrative Law Judge further concluded that the loss of Respondent's DEA registration will work a hardship on Michael Arouth's family. However, his wife owned fifth percent of the stock of the corporation during the period when Michael Arouth was diverting controlled substances from the pharmacy. Judge Bittner was not convinced that Mrs. Arouth would be able to prevent a recurrence of her husband's behavior. Accordingly Judge Bittner recommended that Respondent's DEA Certificate of Registration be revoked. The Administrative Law Judge further recommended that such revocation be effective 90 days from the issuance of the Administrator's order to enable Michael Arouth's wife and daughter to sell the pharmacy. The Government filed exceptions to this recommendation stating that the Arouths have had ample opportunity to sell Respondent pharmacy and therefore the order should be effective 60 days after its issuance.

The Administrator adopts the findings of fact and conclusions of law of the Administrative Law Judge in their entirety. The Administrator further adopts the recommendation of Judge Bittner to revoke Respondent's DEA Certificate of Registration.

The Administrator concludes that the actions of Michael Arouth were so egregious, that Respondent pharmacy, as it presently exists, cannot be entrusted with a DEA Certificate of Registration.

Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration AC6283193, previously issued to Cumberland Prescription Center, be, and it hereby is, revoked, and any pending applications for the renewal of such registration, be, and they hereby are, denied. In addition, the Administrator orders that the application for a new DEA Certificate of Registration, submitted on behalf of Respondent on March 27, 1987, be, and it hereby is, denied. This order is effective December 4, 1987.

Date: September 29, 1987.

John C. Lawn,  
Administrator.

[FR Doc. 87-22856 Filed 10-2-87; 8:45 am]

BILLING CODE 4410-09-M

## DEPARTMENT OF LABOR

### Bureau of Labor Statistics

#### Business Research Advisory Board and Committees; Meetings and Agenda

The regular fall meetings of the Board and Committees of the Business Research Advisory Council will be held on October 20 and 21, and November 19, 1987. All of the meetings will be held in the Frances Perkins Department of Labor Building, 200 Constitution Avenue, NW., Washington, DC.

The Business Research Advisory Board and its committees advise the Bureau of Labor Statistics with respect to technical matters associated with the Bureau's programs. Membership consists of technical officers from American business and industry.

The schedule and agenda for the meetings are as follows:

#### Tuesday, October 20, 1987

10:00 a.m.—Committee on Economic Growth; Room S4215 A & B

1. New Projections
2. Increases in Defense Spending and the Impact on Production and Employment
3. The Rapid Growth in Producer Services
4. Other Business

2 p.m.—Committee on Price Indexes; Room S4215 A & B

1. Status Reports:
  - a. Consumer Price Index
  - b. Producer Price Index
  - c. International Price Indexes
  - d. Consumer Expenditure Surveys
2. Other Business

2 p.m.—Committee on Employment and Unemployment Statistics; Room C5315 (Seminar Room #6)

1. CPS Issues
  - a. Long-Range Plans
  - b. Proposed Supplements
2. LAUS Regression Research
  - a. Current Status
  - b. ICESA Recommendations
3. 790 Survey Issues
  - a. Service Sector Initiatives
  - b. CATI Operational Tests
  - c. Sampling and Estimation Work
4. Report on International Conferences on Business Survey Frames
5. Other business



Wednesday, October 21, 1987

9:30 a.m.—Committee on Wages and Industrial Relations; Room S4215 A, B & C

1. Review of Wages and Industrial Relations 1988 Budget
2. Temporary Help Survey Update
3. Progress on the White-Collar Pay and Benefits Survey and the Professional, Administrative, Technical and Clerical Pay Survey
4. New Developments in the Area Wage Program
5. Introduction of Cost Level Data from the Employment Cost Index
6. Chairman's Summary of the Joint BRAC and LRAC Subcommittee Meetings
7. Other Business

1:30 p.m.—BRAC Board; Room S4215 A, B, & C

1. Chairperson's Opening Remarks
2. Commissioner's Remarks—Janet L. Norwood
3. Committee Reports:
  - a. Economic Growth
  - b. Price Indexes
  - c. Employment and Unemployment Statistics
  - d. Wages and Industrial Relations
4. Other Business
5. Chairperson's Closing Remarks

Thursday, November 19, 1987

10 a.m.—Committee on Occupational Safety and Health Statistics; Room N3437 A & B

1. 1986 Annual Survey Results
2. Report of the Committee on National Statistics, National Academy of Sciences
3. Keystone Recordkeeping Project
4. On-site Records Check Pilot Project
5. Work Injury Reports—Inhalation Study
6. Supplementary Data System (SDS) Update
7. BLS-State Health Department Committee Activities
8. Investigating Alternative Fatality Data Sources
9. Other Business

The meetings are open to the public. It is suggested that persons planning to attend these meetings as observers contact Janice D. Murphey, Liaison, Business Research Advisory Council on Area Code (202) 523-1347.

Signed at Washington, DC this 25th day of September 1987.

Janet L. Norwood,

Commissioner of Labor Statistics.

[FR Doc. 87-22891 Filed 10-2-87; 8:45 am]

BILLING CODE 4510-24-M

## NATIONAL SCIENCE FOUNDATION

### Committee Management; Establishments; Advisory Panels for Archaeology and Physical Anthropology

The Assistant Director for Biological, Behavioral, and Social Sciences has determined that the establishment of the Advisory Panels listed below are necessary and in the public interest in connection with the performance of duties imposed upon the Director, National Science Foundation (NSF) and other applicable law. This determination follows consultation with the Committee Management Secretariat, general Services Administration.

*Name of Committee:* Advisory Panel for Archaeology

*Purpose:* Primarily, to advise on the merit of proposals for research-related purposes submitted to the NSF for financial support. Additionally, the Panel provides oversight, general advice, and policy guidance in the area of Archaeology.

*Name of Committee:* Advisory Panel for Physical Anthropology

*Purpose:* Primarily, to advise on the merit of proposals for research-related purposes submitted to the NSF for financial support. Additionally, the Panel provides oversight, general advice, and policy guidance in the area of Physical Anthropology.

M. Rebecca Winkler,

Committee Management Officer.

September 30, 1987.

[FR Doc. 87-22875 Filed 10-2-87; 8:45 am]

BILLING CODE 7555-01-M

### Committee Management; Renewals; Advisory Committee for Engineering Science in Mechanics, Structures, and Materials Engineering, et al.

The Advisory Committees listed below are being renewed until September 30, 1989.

The Assistant Director for Engineering has determined that the renewal of these Committees is necessary and in the public interest. This determination follows consultation with the Committee Management Secretariat, General Services Administration:

- Advisory Committee for Engineering Science in Mechanics, Structures, and Materials Engineering
- Advisory Committee for Engineering Science in Electrical, Communications, and Systems Engineering
- Advisory Committee for Engineering Science in Chemical, Biochemical, and Thermal Engineering

- Advisory Committee for Critical Engineering Systems (formerly called the Advisory Committee for Critical Engineering Systems Section)
- Advisory Committee for Emerging Engineering Technologies (formerly called the Advisory Committee for Emerging Engineering Systems Section)

M. Rebecca Winkler,

Committee Management Officer.

September 30, 1987.

[FR Doc. 87-22876 Filed 10-2-87; 8:45 am]

BILLING CODE 7555-01-M

## NUCLEAR REGULATORY COMMISSION

[Docket No. 030-12910 Licensee No. 24-17529-01 EA 87-84]

### Order Imposing Civil Monetary Penalty; Aztec Laboratories

I

Aztec Laboratories Post Office Box 31044, Kansas City, MO 64129, is the holder of Byproduct Materials License No. 24-17529-01 issued by the Nuclear Regulatory Commission (Commission or NRC) on June 22, 1977. The license authorizes the licensee to possess and use nickel-63 gas chromatographs for sample analysis in accordance with the conditions specified therein.

II

An inspection of the licensee's activities was conducted during the period March 25 through May 15, 1987. The results of this inspection indicated that the licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the licensee by letter dated June 30, 1987. The Notice stated the nature of the violations, the provisions of the NRC's requirements that the Licensee had violated, and the amount of the civil penalty proposed for the violations. The licensee responded to the Notice of Violation and Proposed Imposition of Civil Penalty by letter dated July 21, 1987.

III

After consideration of the licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that the violations occurred as stated and that the penalty proposed for the violations designated in the Notice of Violation



and Proposed Imposition of Civil Penalty should be imposed.

#### IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, It is Hereby Ordered That:

The licensee pay a civil penalty in the amount of Five Hundred Dollars (\$500) within 30 days of the date of this Order, by check, draft, or money order, payable to the Treasurer of the United States and mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

The licensee may request a hearing within 30 days of the date of this Order. A request for a hearing shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555. A copy of the hearing request also shall be sent to the Assistant General Counsel for Enforcement, Office of General Counsel. If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the licensee fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

(a) Whether the licensee was in violation of the Commission's requirements as set forth in Violation I.A. of the Notice of Violation and Proposed Imposition of Civil Penalty referenced in Section II above and

(b) Whether, on the basis of such violation, this Order should be sustained.

For The Nuclear Regulatory Commission,  
James Lieberman,  
Director, Office of Enforcement.

Dated at Bethesda, Maryland this 28th day of September 1987.

#### Appendix—Evaluations and Conclusions

On June 30, 1987, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for violations identified during an NRC inspection. By letters dated July 21, 1987, Aztec Laboratories (licensee) responded to the Notice. In its response, the licensee admits certain violations occurred as described in the Notice, denies other violations, and provides reasons why it believes that mitigation of the proposed civil penalty is

appropriate. Provided below are: (1) A restatement of each violation; (2) a summary of the licensee's response regarding each violation; (3) NRC's evaluation of the licensee's response; (4) the licensee's arguments in support of mitigation of the proposed civil penalty, and (5) NRC's conclusions regarding the violations and the proposed civil penalty.

#### I. Licensee's Arguments Regarding Violations Assessed Civil Penalty

##### A. Violation IA

**Restatement of Violation.** 10 CFR 20.403(b)(4) requires each licensee to, within 24 hours of discovery of the event, report any event involving licensed material possessed by the licensee that may have caused or threatens to cause damage to property in excess of \$2,000.00.

Contrary to the above, from March 1984 until the date of inspection, the licensee failed to notify the NRC of a March 1984 fire which involved a gas chromatograph unit containing a nominal 14.5 millicuries of nickel-63, and which caused in excess of \$40,000 damage to both the facility and licensed material. Further decontamination costs including consultant fees, decontamination, and waste disposal exceeded \$2,000.

**Summary of Licensee's Response.** The licensee argues that a violation did not occur since the initial cost of the chromatograph device was less than \$2,000 and the damage to the building was caused primarily by the fire of March 1984 and not from the contamination resulting from the chromatograph device.

**NRC Evaluation of Licensee's Response.** 10 CFR 20.403(b)(4) explicitly requires the reporting of "any event involving licensed material" that may have caused or threatens to cause damage to property in excess of \$2,000. The event in this case was the fire which involved the chromatograph device containing licensed material. The cost of the chromatograph device is not determinative. The intent of the reporting requirement described in 10 CFR 20.403(b)(4) is to afford the NRC the opportunity to review all circumstances surrounding incidents similar to the 1984 fire and perform radiological assessments of hazards that may be present. In this case, if the NRC had been notified of the 1984 event, involving licensed material an adequate evaluation of the device would have been performed and contamination would not have gone undetected for three years. A license amendment describing the approved location for

storage of devices would also have been required.

##### B. Violation IB

**Restatement of Violation.** 10 CFR 20.201(b) requires each licensee to make or cause to be made such surveys as are reasonable under the circumstances to evaluate the extent of radiation hazards that may be present. As defined by 10 CFR 20.201(a), "survey" means an evaluation of the radiation hazards incident to the production, use, release, disposal, or presence of radioactive materials. When appropriate, such evaluation includes a physical survey of the location of materials and equipment, and measurements of levels of radiation or concentrations of radioactive material present.

Contrary to the above, from March 1984 until the date of the inspection, the licensee failed to make a reasonable survey to evaluate the extent of radiation hazards present as a result of the March 1984 fire. Although a visual check of the source holder was made after the fire, radiation surveys and wipe tests for leakage were not performed. As a result between March 1984 and March 26, 1987, leakage from the nickel-63 source went undetected.

**Summary of Licensee's Response.** The licensee argues that surveys and wipe tests were not required because the nickel-63 source was in storage and never used.

**NRC Evaluation of Licensee's Response.** NRC expects licensees to perform wipe tests and surveys of sources whenever sources may be damaged. Since the licensee's source was in a fire, wipe tests and surveys should have been performed. This is evident since the nickel-63 source was severely damaged and was leaking radioactive material.

#### II. Licensee's Arguments Regarding Violations Not Assessed Civil Penalty

##### A. Violation IIA

**Restatement of the Violation.** 10 CFR 20.207(a) states that licensed materials stored in an unrestricted area shall be secured from unauthorized removal from the place of storage.

Contrary to the above, from March 1984 until the date of inspection, a nickel-63 source containing 14.5 millicuries was stored at the licensee's Arlington Street facility and was not secured from unauthorized removal.

This is a Severity Level IV violation (Supplement IV).

**Summary of Licensee's Response.** Although the licensee admits that the actual structure was open, the licensee



argues that the location of the building, partial fencing, and large size of the property effectively secured the device and prevented unauthorized removal.

**NRC Evaluation of Licensee's Response.** On March 26, 1987, the inspector went to the licensee's residence and found no one at home. The inspector then walked over to the burned facility and immediately viewed the device on the porch. The inspector found the nickel-63 source housing laying loose on top of the chromatograph device. While it is true that the licensee's property is large and partially fenced, the burned building was visible from the street and the entrance to the property was not fenced.

There were no caution signs, ropes or any other obstructions to keep an individual from becoming contaminated or even removing the source. During the inspection, the licensee admitted that the facility was not restricted for the purpose of radiation protection.

#### B. Violation IIB

**Restatement of Violation.** License Condition No. 17 requires each chromatograph detector cell containing nickel-63 to be tested for leakage and/or contamination at intervals not to exceed six (6) months. In the absence of a certificate from a transferor indicating that a test has been made within six (6) months prior to the transfer, a detector cell received from another person shall not be put into use until tested.

Contrary to the above, each chromatograph detector cell containing nickel-63 has not been tested for leakage and/or contamination every six (6) months as required. Specifically, as of the day of this inspection, one detector cell at the Arlington facility had not been tested for leakage since at least September 1982 and two detector cells, located at the Stadium Drive facility, had not been tested since at least February 1986. Furthermore, the two detector cells at the Stadium Drive facility were received in February 1986 in the absence of a certificate from the transferor indicating that a test had been made within six (6) months prior to transfer and one detector was put into use.

This is a Severity Level IV violation (Supplement VI).

**Summary of Licensee's Response.** The licensee does not contest the violation.

#### C. Violation IIC

**Restatement of Violation.** License Condition No. 18 requires the licensee to conduct a physical inventory every six (6) months to account for all files received and possessed under the license. The records of the inventories

shall be maintained for two (2) years from the date of the inventory for inspection by the Commission, and shall include the quantities and kinds of byproduct material, location of files, and the date of the inventory.

Contrary to the above, as of the date of inspection, records of inventories have not been maintained as required since September 1982.

This is a Severity Level V violation (Supplement VI).

**Summary of Licensee's Response.** The licensee states that all records were lost in the fire and while filed inventories were not available, the licensee was able at the time of the inspection to immediately point out to the inspector where the detectors were in the stadium drive location.

**NRC Evaluation of Licensee's Response.** At the time of the inspection, the licensee stated that visual inventories were performed more often than six months; however, records of inventories were not made. Since records of inventories, even after the fire in 1984, were not maintained as required, the violation remains as stated in the Notice of Violation.

#### D. Violation IID

**Restatement of Violation.** License Condition No. 10 states licensed material shall be used only at the licensee's facilities located at 3933 Arlington Street, Kansas City, Missouri.

Contrary to the above, in February 1986, two detector cells containing licensed material were received at a facility not authorized by this license where one detector cell was placed in storage and one detector cell was put into use.

This is a Severity Level IV violation (Supplement VI).

**Summary of Licensee's Response.** The licensee does not contest the violation.

#### III. Licensee's Arguments for Mitigation of Civil Penalty

In requesting mitigation of the proposed civil penalty, the licensee points out three reasons why the civil penalty should not be imposed. The licensee states that once it became aware of the errors, actions were taken in an expeditious manner to correct the problem. The licensee also states that it does not have a prior history of similar events and that imposition of a civil penalty at this time would present a financial hardship on the licensee.

**NRC's Evaluation of Licensee's Arguments for Mitigation of Civil Penalty.** It is important to establish that the event was discovered by the NRC. As a result, a Confirmatory Action Letter was issued on April 10, 1987 to

the licensee outlining several actions which needed immediate attention. The NRC agrees that the licensee dealt with those actions within the timeframe specified in the letter. NRC Enforcement Policy 10, CFR Part 2, Appendix C, Section V.B.2 states, "Unusually prompt and extensive corrective action may result in reducing the proposed civil penalty as much as 50 percent of the base value." The fire occurred in March 1984 and contamination of the facility went undetected until the March 26, 1987 inspection by the NRC. Once the problem was identified, the NRC provided guidance to the licensee on what actions were needed to assure the contamination was not widespread and how to properly decontaminate the facility and properly dispose of the radioactive waste. While the NRC agrees that the licensee complied with the actions contained in the Confirmatory Action Letter, NRC does not consider these actions unusually prompt or extensive.

Since the licensee had never been inspected prior to the March 25 through May 15, 1987 inspection, no basis to determine the licensee's inspection history exists. The violations identified during the inspection would indicate that the violations have been ongoing for a number of years.

In reviewing the licensee's argument that the proposed civil penalty of Five Hundred Dollars (\$500) would impose a significant financial hardship on the laboratory, the licensee has not provided sufficient information to warrant mitigation of the proposed civil penalty.

**NRC Conclusion.** The NRC staff has concluded that all violations did occur as originally stated in the June 30, 1987 Notice of Violation and Proposed Imposition of Civil Penalties. These violations collectively show the licensee's failure to fully understand NRC requirements and the significance of the March 1984 event. A sufficient basis was not provided for mitigation of the proposed civil penalty. Therefore, the NRC staff has concluded that a \$500 civil penalty should be imposed.

[FR Doc. 87-22940 Filed 10-2-87; 8:45 am]  
BILLING CODE 7590-01-M

[Docket Nos. 50-237 and 50-249]

**Exemption; Commonwealth Edison Co., Dresden Nuclear Power Station Units 2 and 3**

I

The Commonwealth Edison Company (CECo, the licensee) is the holder of



Provisional Operating License No. DPR-19, which authorizes operation of Dresden Station Unit 2, and Facility Operating License No. DPR-25, which authorizes operation of Unit 3. These licenses provide, among other things, that Dresden Units 2 and 3 are subject to all rules, regulations, and Orders of the Commission now or hereafter in effect.

The station comprises two boiling water reactors at the licensee's site located in Grundy County, Illinois.

## II

On November 19, 1980, the Commission published a revised § 50.48 and a new Appendix R to 10 CFR Part 50 regarding fire protection features of nuclear power plants. The revised § 50.48 and Appendix R became effective on February 17, 1981. Section III of Appendix R contains 15 subsections, lettered A through O, each of which specified requirements for a particular aspect of the fire protection features at a nuclear power plant. One of these subsections, III.G, is the subject of the licensee's exemption request.

Subsection III.G.2 of Appendix R requires that one train of cables and equipment necessary to achieve and maintain safe shutdown be maintained free of fire damage by one of the following means:

a. Separation of cables and equipment and associated nonsafety circuits of redundant trains by a fire barrier having a 3-hour rating. Structural steel forming a part of or supporting such fire barriers shall be protected to provide fire resistance equivalent to that required of the barrier.

b. Separation of cables and equipment and associated nonsafety circuits of redundant trains by a horizontal distance of more than 20 feet with no intervening combustibles or fire hazards. In addition, fire detectors and an automatic fire suppression system shall be installed in the fire area.

c. Enclosure of cable and equipment and associated nonsafety circuits of one redundant train in a fire barrier having a 1-hour rating. In addition, fire detectors and an automatic fire suppression system shall be installed in the fire area.

Subsection III.G.3 of Appendix R requires that where Subsection III.G.2 cannot be met, alternative or dedicated shutdown capability should be provided. Also, for areas, rooms, or zones where alternative or dedicated shutdown is provided, fire detection and a fixed-fire suppression system shall be installed.

## III

By letter dated June 5, 1986, the licensee requested an exemption from

Section III.G.3 of Appendix R to the extent that it requires the installation of automatic fire detection and fixed-fire suppression systems in the drywell expansion gap.

The drywell is constructed of a steel containment shell that is surrounded by a concrete shield structure. The steel containment shell is spherical on the bottom and cylindrical at the top. The normal operation of the reactor (or accidents) will cause the steel shell to expand in all directions. This expansion is accommodated by providing a 2-inch gap. During construction, polyurethane foam sheets were installed over the exterior of the steel shell. An epoxy impregnated fiberglass tape was used over the joints and then ¼- and ¾-inch thick fiberglass-epoxy prefabricated cover panels were installed over the foam sheets. Concrete was placed over this material and, when hardened, the sandwiched materials provide the 2-inch gap because they are crushable as the steel containment shell expands. The foam materials serve no other purpose.

No fire protection is provided within the 2-inch gap. However, fire detectors are located in the reactor building fire zones adjacent to the electrical and mechanical drywell penetrations. Manual fire fighting equipment is available throughout the reactor building.

The only safe shutdown components located in the expansion gap are electrical conductors inside the electrical penetration assembly canisters and instrumentation taps in mechanical penetrations. These electrical conductors are associated with valves required for hot and cold shutdown and associated cables for automatic RHR system functions. The taps for reactor level indicating switches and pressure indicators are routed in mechanical penetrations.

The fire load in the 2-inch gap is composed of the polyurethane sheets and fiberglass cover panels, both combustible. The 2-inch gap is bounded on one side by the steel shell and on the other side by a 4-foot thick reinforced concrete shield/wall.

The electrical penetrations all have the same basic configuration. An electrical assembly is sized so that it can be inserted into the electrical penetration nozzle. The nozzles are 12-inch, schedule 80 steel pipe, with wall thickness of 0.688 inches. Each assembly is in conformance with the ASME Boiler and Pressure Code, Section III, for Class B Vessels. The penetrations extend 1 foot beyond the drywell wall on both sides. The drywell wall in the vicinity of the penetrations is about 6 feet thick.

The mechanical penetrations are of two types, viz., hot and cold. The hot ones are designed to accommodate thermal expansion and have guard pipes between the line and the penetration nozzle. The mechanical penetrations are also constructed of thick walled steel pipes and plates. The penetration nozzles conform to the ASME Pressure Vessel Code, Section VIII. The nozzle walls are welded to the steel shell containment structure.

The fire protection in the drywell expansion gap does not comply with the technical requirements of Section III.G.3 of Appendix R because a fixed-fire suppression system and a fire detection system have not been installed in an area for which an alternative shutdown system has been provided.

There was a concern that a fire within the drywell expansion gap could damage safe shutdown related penetrations (electrical and/or mechanical). Because of the combustible material sandwiched within the 2-inch expansion gap, it is possible that a fire could develop and spread through the gap.

There are two fire protection concerns for the drywell expansion gap. The first concern is whether or not a fire in the gap can spread out of the gap and into other fire areas of fire zones. The second concern revolves around whether or not a fire in the 2-inch gap proper can affect the safe shutdown capability by damaging the penetrations directly.

With respect to a fire in the drywell expansion gap spreading into other areas, the concern is mitigated by the fact that the 2-inch gap is sandwiched between the steel shell containment structure and the 4 to 6 foot thick reinforced concrete shield wall. The total mass of these two boundaries would serve as a heat sink and dissipate most of the energy of a fire in the drywell gap. The penetrations consist of steel penetration nozzles that are welded firmly in place and surrounded by the concrete wall. This forms a complete enclosure of the gap except for a 2-inch annulus around each penetration. The drywell is inerted and the spread of fire into the drywell is, therefore, not possible during operation. Should a fire in the drywell gap spread into the reactor building, it would effect only one fire area of one unit and, therefore, an independent safe shutdown path would be available.

With respect to the effects of a drywell gap fire on the penetrations and the possible degradation of safe shutdown capability, it is unlikely that the electrical and mechanical penetrations would be damaged by an



expansion gap fire to the extent that their function would be impaired, because of the schedule 80 steel pipe, heavy metal plates, and their weld attachment to the steel containment shell. However, the licensee did consider this possibility. In Table 11.2-3 and 11.2-4 of their June 5, 1986 submittal, the licensee listed all of the safe shutdown functions that they had identified as being contained within the penetrations. As a result of that evaluation, the licensee concluded that a fire in the drywell gap would not result in any impairment of safe shutdown capability in either unit for the following reasons:

1. Some electrical penetrations contain power cables to individual safe shutdown valves that are normally open and that must remain open for hot shutdown. A fault in, or loss of, these cables will not change the position of the valves.

2. Other penetrations contain cables which could disable the Target Rock valve if they were damaged. However, the mechanical function of the Target Rock and other safety relief valves will not be affected by a fire in the expansion gap, thus assuring availability of Reactor Pressure Vessel pressure control capability.

3. Instruments are available to monitor reactor vessel level that have their essential and associated circuits routed independent of the expansion gap, and

4. Manual actions can be performed to open valves required for cold shutdown or to close valves in lines that are not used as fluid paths for hot shutdown.

A fire could cause a spurious readout of reactor water level indicator instruments located in the expansion gap. Correct readings could still be obtained from other redundant division instruments because the spacing between the redundant divisions routed through the gap is 45 feet. The amount of urethane is limited and a fire would involve only one division at a time. Once the material burned away from a penetration, the temperature would return to ambient level quickly. In the Dresden Unit 3 gap fire investigative report dated May 6, 1986, this was found to be the case, and, further, it was also concluded that plant safe shutdown capability is still maintained given a drywell expansion gap fire.

A final reason that a fire detection and a fixed-fire suppression system should not be required for the drywell expansion gap space is that it would be physically impossible to remove the existing foam and install the fire protection systems. In any event, the installation of a fire detection system

and a fixed-fire suppression would not significantly upgrade the level of fire protection for either Unit 2 or Unit 3.

Based on the above evaluation, the staff concluded that the existing fire protection features and physical characteristics of the drywell expansion gap and its boundaries provide a level of fire protection equivalent to the technical requirements of Section III.G.3 of Appendix R.

The licensee provided information relevant to the "special circumstances" finding required by revised 10 CFR 50.12(a). The licensee stated that existing and proposed fire protection features at Dresden Nuclear Power Station Units 2 and 3 accomplish the underlying purpose of the rule. Implementing modifications to provide additional suppression systems and detection systems would require the expenditure of engineering and construction resources, as well as the associated capital costs, which would represent an unwarranted burden on the licensee's resources.

The licensee also stated that these costs are significantly in excess of those required to meet the underlying purpose of the rule. The staff concludes that "special circumstances" exist for the licensee's requested exemptions in that application of the regulation in these particular circumstances is not necessary to achieve the underlying purposes of Appendix R to 10 CFR Part 50. See 10 CFR 50.12(a)(2)(ii).

#### IV

Accordingly, the Commission has determined, pursuant to 10 CFR 50.12(a), that (1) these exemptions as described in Section III are authorized by law and will not present an undue risk to the public health and safety and are consistent with common defense and security, and (2) special circumstances are present for the exemptions in that application of the regulation in these particular circumstances is not necessary to achieve the underlying purposes of Appendix R to 10 CFR Part 50. Therefore, the Commission hereby grants the aforementioned exemptions from the requirements of Section III.G of Appendix R to 10 CFR Part 50 as described in Section III above.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of these exemptions will have no significant impact on the environment (52 FR 35978 dated September 24, 1987).

This Exemption is effective upon issuance.

For The Nuclear Regulatory Commission.

**Dennis M. Crutchfield,**

*Director, Division of Reactor Projects—III, IV, V and Special Projects Office of Nuclear Reactor Regulation.*

Dated at Bethesda, Maryland, this 28th day of September 1987.

[FR Doc. 87-22941 Filed 10-2-87; 8:45 am]

BILLING CODE 7590-01-M

## SECURITIES AND EXCHANGE COMMISSION

[File Nos. 7-0498 and 7-0499]

### Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Midwest Stock Exchange, Inc.

September 29, 1987.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

CML Group, Inc.

Common Stock, \$.10 Par Value (File No. 7-0498)

Financial News Composite Fund, Inc.

Common Stock, \$.01 Par Value (File No. 7-0499)

These securities are listed and registered on one or more other national securities exchange and is reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before October 20, 1987 written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 87-22864 Filed 10-2-87; 8:45 am]

BILLING CODE 8010-01-M



[File Nos. 7-0493 et al.]

**Self-Regulatory Organizations;  
Applications for Unlisted Trading  
Privileges and of Opportunity for  
Hearing; Midwest Stock Exchange, Inc.**

September 29, 1987.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

- New York Tax Exempt Income Fund, Inc. (The)  
Common Stock, \$.01 Par Value (File No. 7-0493)
- Americus Trust for Sears Shares Scores (File No. 7-0494)
- General Electric Credit Corp.  
Currency Exchangeable Warrants, Expiring July 1, 1992 (File No. 7-0495)
- Tacoma Boatbuilding Co.  
Common Stock, \$.01 Par Value (File No. 7-0496)
- Wean Incorporated (Pennsylvania)  
Common Stock, \$1.00 Par Value (File No. 7-0497)

These securities are listed and registered on one or more other national securities exchange and is reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before October 20, 1987 written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-22885 Filed 10-2-87; 8:45 am]

BILLING CODE 8010-01-M

[File No. 7-0488 et al.]

**Self-Regulatory Organizations;  
Applications for Unlisted Trading  
Privileges and of Opportunity for  
Hearing; Philadelphia Stock Exchange,  
Inc.**

September 29, 1987

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

- PHLCORP, Inc.  
Common Stock, \$1.00 Par Value (File No. 7-0488)
- Telesphere International, Inc.  
Common Stock, \$.01 Par Value (File No. 7-0489)
- Variety Corporation  
\$1.30 Sr. Red. Conv. Pfd., Class 1 Shares, Series A (File No. 7-0490)
- UNC Incorporated  
Common Stock \$.20 Par Value (File No. 7-0491)
- Fairchild Industries, Inc.  
Common Stock, \$.01 Par Value (File No. 7-0492)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before October 20, 1987, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-22886 Filed 10-2-87; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-16008; 812-6859]

**Application; AIG Life Insurance Co.  
et al.**

September 28, 1987.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for exemption under the Investment Company Act of 1940 (the "1940 Act").

**Applicants:** AIG Insurance Company (the "Company"); Variable Account I (the "Separate Account"); American International Fund Distributors, Inc. ("Distributors").

**Relevant 1940 Act Sections:** Exemption requested under Section 6(c) from sections 26(a) and 27(c)(2).

**Summary of Application:** Applicants seek an order to permit them to issue deferred annuity contracts (the "Contracts") which will permit a deduction of Mortality and Expense Risk Charges.

**Filing Date:** The Application was filed on August 31, 1987.

**Hearing or Notification of Hearings:** If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m. on October 23, 1987. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. The Company and the Separate Account One Alico Plaza, Wilmington, Delaware 19894 and the Distributors, 70 Pine Street, New York, New York 10270.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey M. Ulness, Attorney (202) 272-2026 or Lewis B. Reich, Special Counsel, (202) 272-2061 (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application: the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

**Applicant's Representations**

1. The Company is a stock life insurance company organized under the



laws of the State of Pennsylvania in 1962. The ultimate parent of the company is American International Group, Inc.

2. The Company established the Separate Account on June 5, 1986, pursuant to the provisions of Pennsylvania Insurance law, to act as the funding entity for the Contracts to be issued by the Company. The Separate Account is a segregated investment account of the Company and is registered with the SEC as a unit investment trust.

3. The net purchase payments under the Contracts are allocated to the Separate Account. (Net purchase payments are the purchase payments less any premium tax). The Separate Account is divided into Sub-accounts, with the assets of each Sub-account invested in one Series of Delaware Group Premium Fund, Inc. (the "Fund").

4. The Fund is a Maryland Corporation registered under the Act as a diversified open-end management investment company of the series type. It currently comprises four portfolios: Equity-Income Series, High Yield Series, Capital Reserves Series and Multiple Strategy Series. The Company may, from time to time, add additional Series to the Fund, and, when appropriate, additional mutual funds to act as funding vehicles for the Contracts. Delaware Management Company, Inc., manages the Fund. The Contracts will be distributed through American International Fund Distributors, Inc.

5. The Contracts are individual single purchase payment deferred variable annuity contracts which provide for accumulation of contract values on a variable basis and payment of monthly annuity payments on a fixed and/or variable basis. The Contracts are designed for use by individuals for retirement planning. The Contracts may or may not qualify for any special tax treatment afforded qualified plans under the Internal Revenue Code. The minimum purchase payment the Company will accept is \$10,000.

6. The Company assumes mortality and expense risks under the Contracts. The mortality risks assumed by the Company arise from its contractual obligations to make annuity payments after the Annuity Date for the life of Annuitant, to waive the Deferred Sales Charge in the event of the death of the Annuitant and to provide the death benefit prior to the Annuity Date. The expense risk assumed by the Company is that the costs of administering the Contracts and the Separate Account will exceed the amount received from the Administrative Charge.

7. The Company will assess the Separate Account with a daily asset charge for mortality and expense risks which amounts to an aggregate, on an annual basis, of 1.25% of the average daily net asset value of the Separate Account (consisting of approximately .90% for mortality risks and approximately .35% for expense risks). This charge is guaranteed by the Company and cannot be increased. If the Mortality and Expense Risk Charge is insufficient to cover the actual costs, the loss will be borne by the Company. Conversely, if the amount deducted proves more than sufficient, the excess will be profit to the Company. The Company expects a profit from this charge. Applicants represent that the 1.25% total for these charges, which it currently proposes to charge, is reasonable in relation to the risks assumed and guarantees provided in the Contract. This representation is based upon a analysis of the mortality risks, taking into consideration such factors as any contractual right to increase charges above current levels, the guaranteed annuity purchase rates, the expense risks taking into account the existence of charges for other than mortality and expense risks and the estimated costs, now and in the future, for certain product features. The Company will maintain at its principal office, available to the Commission, a memorandum setting forth in detail this analysis.

8. In the event that a contractowner withdraws all or a portion of the contract value in excess of the Free Withdrawal Amount for the first withdrawal in a contract year, a Deferred Sales Charge may be imposed. The Free Withdrawal Amount is equal to ten percent (10%) of the contract value at the time of withdrawal. The Deferred Sales Charge, which will vary in amount depending upon when the Purchase Payment was made, is calculated against the amount withdrawn. The amount of any withdrawal which exceeds the Free Withdrawal Amount will be subject to the following charge:

Contract year	Applicable deferred sales charge percentage
1.....	6
2.....	5
3.....	4
4.....	3
5.....	2
6.....	1
7 and thereafter.....	0

The Deferred Sales Charge will not exceed 9% of purchase payments. In the event that the contractowner selects an

annuity date within six (6) years from the date of issue, the Company will assess a Deferred Sales Charge, on the annuity date, as if a withdrawal had taken place. The Deferred Sales Charge is intended to reimburse the Company for expenses incurred which are related to Contract sales such as sales commissions, promotional expenses associated with the marketing of the Contracts, including costs associated with the printing and distribution of the prospectus, the Contracts, sales materials and any other relevant information concerning the Contracts. To the extent the charge is insufficient to cover all distribution costs, the Company may use any of its corporate assets, to make up any differences. The corporate assets may include potential profit which may arise from the Mortality and Expense Risk Charge. Applicants acknowledge that the Deferred Sales Charge may be insufficient to cover all costs relating to the distribution of the Contracts and that if a profit is realized from the Mortality and Expense Risk Charge, all or a portion of such profit may be offset by distribution expenses not reimbursed by the Deferred Sales Charge. In such circumstances a portion of the Mortality and Expense Risk Charge might be viewed as providing for a portion of the costs relating to distribution of the Contracts. Notwithstanding the foregoing, the Company has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements made with respect to the Contracts will benefit the Separate Account and the contractowners. The basis for such conclusion is set forth in a memorandum which will be maintained by the Company as its principal office and will be available to the Commission. Moreover, the Company represents that the Separate Account will invest only in an underlying mutual fund which undertakes, in the event it should adopt any plan under Rule 12b-1 to finance distribution expenses, to have such plan formulated and approved by a board of directors, a majority of the members which are not "interested persons" of such fund within the meaning of section 2(a)(19) of the Act.

9. The Company deducts an annual Administrative Charge, which is currently \$30 per year, from the contract value to reimburse it for administrative expenses relating to maintenance of the Contract and the Separate Account. The Company may increase this charge to an amount not to exceed \$100 per year. Prior to the annuity date, the Administrative Charge is deducted from the contract value on each contract



anniversary. If the annuity date is a date other than a contract anniversary, the Company will also deduct a pro-rata portion of the Administrative Charge from the contract value for the fraction of the contract year preceding the annuity date. This charge is also deducted on the date of any total withdrawal. After the annuity date, this charge is deducted on a pro-rata basis from each annuity payment.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-22860 Filed 10-2-87; 8:45 am]  
BILLING CODE 8010-01-M

[File No. 1-6000]

**Issuer Delisting; Application to Withdraw From Listing and Registration; CJI Industries, Inc. (Class A Common Stock)**

September 29, 1987.

CJI Industries, Inc. ("Company"), has filed an application with the Securities and Exchange Commission pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2-2(d) promulgated thereunder, to withdraw the above specified security from listing and registration on the Philadelphia Stock Exchange, Inc. ("Phlx").

The reasons alleged in the application for withdrawing this security from listing and registration on the Phlx include the following:

On March 16, 1987, the Company requested delisting of the Class A Common Stock from the Phlx because (i) dual trading of the Class A Common Stock on the Phlx and in the National Market System of NASDAQ had resulted in confusion and complaints by security holders and (ii) national over-the-counter market listing provided more competitive brokers and therefore more competitive stock prices and liquidity to stockholders.

Any interested person may, on or before October 20, 1987 submit by letter to the Secretary of the Securities and Exchange Commission, Washington, DC 20549, facts bearing upon whether the application has been made in accordance with the rules of the Exchange and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-22882 Filed 10-2-87; 8:45 am]  
BILLING CODE 8010-01-M

[Rel. No. IC-16009; 812-6809]

**Application, Criterion Special Series, Inc., et al.**

September 28, 1987.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for exemption under the Investment Company Act of 1940 ("1940 Act").

**Applicants:** Criterion Special Series, Inc. ("CSS"), Criterion Bond Fund, Criterion Income Trust, Criterion Special Equity Portfolios, Criterion Technology Fund, Current Interest, Inc., Pilot Fund, Inc., Sunbelt Growth Fund, Inc., The Tax Free Fund, Inc. ("Funds"), and Criterion Distributors, Inc. ("CDI") collectively with the Funds, "Applicants".

**Relevant 1940 Act Sections:** Exemption requested under section 6(c) from the provisions of sections 2(a)(32), 2(a)(35), 22(c) and 22(d) of the 1940 Act and Rule 22c-1 thereunder. Approval of exchange offers requested under section 11(a).

**Summary of Application:** Applicants seek an order to permit CSS and CDI to impose a contingent deferred sales charge ("CDSC") on certain redemptions of CSS's shares and to permit the waiver of such charge in certain circumstances described in the application. Applicants also seek an order which will permit certain exchanges of shares among registered investment companies for which CDI or an affiliated person of Criterion Group, Inc. may serve as principal underwriter.

**Filing Date:** The application was filed on August 4, 1987. An amendment, the substance of which has been set forth in a letter to the staff of the Commission dated September 25, 1987, and thus is included herein, will be filed during the notice period.

**Hearing or Notification of Hearing:** If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on October 21, 1987. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request, either personally or by mail, and also send it to

the Secretary of the SEC, along with proof of service by affidavit or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 5th Street, N.W., Washington, DC 20549. Applicant, 1000 Louisiana, Houston, Texas 77002 (Attention: Thomas J. Press, Esq.)

**FOR FURTHER INFORMATION CONTACT:** Cecilia Cantrill, Staff Attorney (202) 272-3037, or Curtis R. Hilliard, Special Counsel (202) 272-3030 (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

**Applicant's Representations**

1. CSS, a series company which is a Maryland corporation, and each of the other Funds, are or will be registered under the 1940 Act as open-end, management investment companies. CDI is a registered broker-dealer and presently serves as principal underwriter of each of the Funds. Criterion Funds, Inc. ("CFI"), the parent of CDI, is the investment adviser of each of the Funds.

2. Shares of each series of CSS ("Portfolios") may currently be sold to the public at their current net asset value per share plus a front-end sales charge ("FESC"). CSS and CDI propose to offer shares of each portfolio of CSS to the public with a CDSC under which the CDSC will be deducted from the proceeds of certain redemptions of shares. The aggregate amount of the CDSC to a shareholder will not exceed 6% of the original value of shares in the share-holder's account. The CDSC would be imposed on any redemption of shares, the dollar amount of which exceeds the aggregate of: (a) The value at the time of purchase of all shares in the account purchased more than six years prior to the redemption (with shares outstanding on the date of implementation of the CDSC arrangement being treated as having been held for more than six years and having been purchased at the net asset value in effect on such date), plus (b) the value at the time of reinvestment of all shares in the account acquired through reinvestment of all shares in the account acquired through reinvestment of dividends or capital gains distributions, plus (c) the increase, if any, in the value



of all shares in the account (including those acquired through reinvestment) over the purchase price (or deemed purchase price, in the case of shares held on the date the CDSC is implemented) of all such shares. Redemptions will be processed in a manner so as to maximize the dollar amount of the redemption proceeds which will not be subject to a CDSC. Accordingly, each redemption of shares will be assumed to have been made first from the exempt amounts referred to in clauses (a), (b) and (c) above, and second through liquidation of those shares in the account purchased within the six years preceding the redemption on a first-in-first-out basis.

3. Where a CDSC is imposed, the amount of charge will depend upon the number of years since the investor purchased the shares which are being redeemed. The CDSC imposed will be 6% during the first year following the purchase and will decrease 1% per year through the sixth year with no charge imposed in the seventh and subsequent years. For purposes of computing the number of years during which shares were held prior to redemption, all purchases during a month will be aggregated and deemed to have been made on the first day of the month. On each succeeding anniversary of such date, the shares so purchased will be treated as having been held an additional year prior to redemption.

4. It is proposed that the CDSC will be waived with respect to certain types of redemptions of shares, pursuant to waivers adopted and applied in accordance with Rule 22d-1. Presently proposed waivers would include, and be applicable to redemptions of shares: (a) By persons and companies affiliated with any of the Funds, Criterion Group, Inc. and its subsidiaries, and broker-dealers which distribute shares of the Funds, clients of any investment advisory subsidiary of Criterion Group, Inc. (or by affiliated persons or the sponsoring companies of such clients) and clients of nationally recognized consulting firms which provide consulting services to pension funds or major corporations, state and local governments, Taft-Hartley Plans and foundations and endowments, which have contacted the Fund, the Investment Advisor, the Fund's principal underwriter or any other operating subsidiary of Criterion Group, Inc. with respect to furnishing advice to such client of such consulting firm or with respect to distribution of securities of a Fund by or purchase of securities of a Fund by such client (the "Criterion Redemption"); (b) resulting from the

mandatory redemption of shares of accounts of \$500 or less; and (c) which represent the proceeds of a prior redemption pursuant to a one-time reinstatement privilege (the "Reinstatement Privilege").

5. CSS proposes to finance distribution expenses pursuant to a plan of distribution adopted pursuant to Rule 12b-1 (the "Plan"). The Plan provides that each portfolio of CSS will pay compensation to CDI for its distribution services consisting of up to 5% of the amount received by the portfolio for each share sold on or after the effective date of the Plan (excluding reinvestment shares and shares eligible for the Criterion Redemption), plus a separate distribution fee approximately calculated by applying the rate of 1% over the prevailing prime rate to the outstanding balance of uncovered distribution charges. CDI will use its own funds to pay to each authorized dealer selling shares up to 5% of the purchase price of shares sold through such dealer. Payments of such compensation will be spread over time so that the aggregate amount of such payments during any fiscal year shall not exceed .90% of the portfolio's average daily net assets represented by shares issued after implementation of the CDSC arrangement. Such compensation payments by each portfolio ("Dealer Compensation Payments") will be payable monthly, but will be automatically discontinued during any period in which there are no outstanding uncovered distribution charges under such Plan. Uncovered distribution charges are approximately equivalent to all amounts due to CDI under the above formula less payments made with respect thereto under the Plan and CDSC received by CDI. Although CDI will normally receive the CDSC, the CDSC will be retained by the portfolio during any period in which there are no uncovered distribution charges.

6. It is expected that whenever there is an exchange of shares from one portfolio of CSS to another portfolio (or an exchange among CDSC Funds), as described below, CDI will waive a portion of the Dealer Compensation Payments payable by the first portfolio by reducing that portfolio's uncovered distribution charges to reflect the fact that such charges of the first portfolio will not be offset in the future by 12b-1 payments or CDSC on those shares. The uncovered distribution charges of the second portfolio will be increased by the amount of such reduction.

7. The Plan also authorizes each portfolio of CSS to make monthly

payments to reimburse CDI for, or to bear directly the costs of, actual distribution-related or administrative expenditures incurred in the distribution of shares, including: Incentive compensation to organizations which sell shares; advertising costs; the costs of preparing and distributing sales literature, prospectuses and statements of additional information for prospectuses and statements of additional information for prospective investors; and the costs of implementing and operating the Plan. The total of payments by a portfolio to CDI for reimbursement for the above and direct costs of the portfolio for such sales literature, prospectuses and statements of additional information may not exceed an amount computed at the annual rate of .35% of the portfolio's average daily net assets during the preceding month. These payments are distinct from the Dealer Compensation Payments described above and, as such, are not subject to automatic discontinuance when there are no outstanding uncovered distribution charges under the Plan.

8. The Funds also propose to make available certain exchange privileges to shareholders of the CDSC Funds, FESC Funds and the Funds which are sold without any sales charges ("NL Funds"). Under this proposal, shareholders of any CDSC Fund (or portfolio thereof) could exchange shares for another CDSC Fund or CDSC portfolio without imposition of any CDSC on such exchanges. In the absence of an applicable waiver, the CDSC would be determined upon the ultimate redemption of shares, using the date of original purchase of the shares that were exchanged to measure the holding period of the redeemed shares. Of the shares being exchanged in such an exchange a pro-rata portion of the original purchase amount of the investor's shares purchased (or deemed purchased): (a) More than six years prior to the exchange; (b) through dividend reinvestment; and (c) less than six years prior to the exchange, would be deemed to be the shares exchanged in the transaction. In this way any CDSC liability will be spread ratably among the shares of the CDSC Fund originally purchased and the CDSC shares acquired in the exchange.

9. It is also proposed that shareholders of a CDSC Fund be given the opportunity to exchange their shares for shares of any NL Fund without imposition of any CDSC on such exchange and to exchange the shares so acquired for shares of any NL Fund or CDSC Fund. Any applicable CDSC would be imposed only upon the



redemption of shares for cash, using only the periods in which shares of a CDSC Fund were held for purposes of computing the holding period of the redeemed shares. On an exchange from a CDSC Fund to an NL Fund, of the dollar amount being exchanged, the amount which represents the current net asset value of the investor's shares which (a) were originally purchased (regardless of intervening exchanges among CDSC Funds) more than six years prior to the exchange (and, as a result, on which no CDSC is payable) or (b) represent reinvestment shares (despite intervening exchanges) (and, as a result, on which no CDSC is payable) (all such shares described in clauses (i) and (ii) hereof and elsewhere are hereinafter referred to as "Free Shares") would be deemed exchanged first. If the dollar amount of the shares exchanged exceeds the value of the investor's Free Shares, the exchange will next be deemed to have been made of shares held (or deemed to have been held, if there were prior exchanges) by the investor for the longest period of time within the applicable six-year period. The amount of the investor's deemed purchase value for the shares acquired in exchange for the non-Free Shares will thereafter be deemed to be equal to the actual (or, if there have been prior exchanges, the deemed) purchase value of the exchanged non-Free Shares.

10. It is further proposed that shares of an NL Fund acquired through reinvestment after an exchange into such NL Fund or through reinvestment of distributions received from a direct investment in an NL Fund would also be treated as Free Shares and would, in each case, be eligible for exchange into a CDSC Fund or into an FESC Fund without any sales charge or into an NL Fund. Shares of an NL Fund purchased directly will be eligible for exchange only for shares of another NL Fund.

11. Applicants propose to permit shareholders of any FESC Fund to exchange their shares for shares of any CDSC Fund or FESC Fund, either directly or with one or more intervening exchanges through an NL Fund, CDSC Fund or FESC Fund. Because an FESC will already have been paid with respect to these shares or such shares will be reinvestment shares, no CDSC would be payable on the ultimate redemption of amounts acquired in exchange for FESC shares, regardless of the Fund redeemed from. (Upon their exchange, FESC Fund shares would thus be included within the definition of "Free Shares").

12. Finally, it is proposed that shareholders of a CDSC Fund be offered the privilege of exchanging their shares

for shares of any FESC Fund, either directly or with one or more intervening exchanges through an NL Fund. Any applicable CDSC (but not an FESC) will be imposed at the time of exchange. In computing such charge, amounts will be deemed exchanged in the same sequence and priority utilized for redemptions of shares of an NL Fund acquired in exchange for shares of a CDSC Fund. Shares of an FESC Fund acquired in this manner will be treated as Free Shares.

13. The exchange offers proposed may be subject to various conditions described in the application. Although an administrative fee may be imposed on exchanges, in no event will such fee exceed the amount of such fee as would be permitted under proposed Rule 11a-3 when adopted. Applicants reserve the right to commence, suspend or otherwise restrict operation of any or all of the foregoing exchange privileges.

#### Applicants' Legal Conclusions

Applicants submit that the requested exemptions and orders are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. The CDSC permits shareholders to have the advantage of more investment dollars working for them at the time of their purchase than with a traditional front-end sales charge of comparable amount. The CDSC and the Plan are fair to CSS and its shareholders, and would similarly be fair to the shareholders of any of the Funds which may in the future impose a CDSC, because they are designed to achieve parity between those shareholders electing to hold their shares and continue as shareholders and those shareholders electing early redemption of their shares. In each situation in which the CDSC is presently proposed to be waived or deferred, the redeeming shareholder (a) would have purchased shares under circumstances that did not require the principal underwriter to incur substantial additional distribution expenses, or (b) have had no control over the timing of such redemption. In addition, because all waivers would be affected in accordance with Rule 22d-1 under the 1940 Act, any waivers of the CDSC would by definition have to be consistent with Rule 22d-1, which permits scheduled variations in or eliminations of sales charges for particular classes of investors and requires appropriate disclosure. In addition, Applicants submit that the proposed exchange offers are fair and in the best interests of shareholders of the Funds because of the manner in which

they will operate and because they afford shareholders flexibility in their financial planning.

#### Applicants' Conditions

If the requested orders are issued, Applicants have agreed to the imposition of the following conditions:

1. In connection with any waivers or deferrals of the CDSC, each CDSC Fund and principal underwriter of such fund will comply with all of the conditions set forth in Rule 22-1 (or any successor rule) under the 1940 Act.

2. Each CDSC Fund, NL Fund and FESC Fund, and the principal underwriters thereof, in connection with any offers of exchange of shares, will comply with the provisions of proposed Rule 11a-3 (or any similar rule) under the 1940 Act when and if such rule is adopted by the SEC.

3. Each CDSC Fund and its principal underwriter will comply with the provisions of Rule 12b-1 (or any successor rule) under the 1940 Act, as such Rule may be amended from time to time.

4. To the extent that the CSS or CDI has imposed any CDSC, waived such sales charges or made offers of exchange, as described herein, prior to the date of receiving the order requested in the application, each is relying upon its own interpretation of the 1940 Act and the Rules thereunder, and understands that any such order will be effective and apply prospectively on and after the date of such order.

5. In evaluating the continued appropriateness of the 12b-1 plan adopted by any CDSC Fund and in making a determination of whether to continue or modify the plan, the Board of Directors (or Trustees) of each CDSC Fund will consider, among other things, the direct and indirect expenses that CFI and the fund's principal underwriter have incurred in promoting sales of shares and, in this regard, will review the extent to which such expenses have, in effect, been offset through the payment of compensation under such plan and receipt of CDSC.

6. The CDSC Funds will fully disclose the CDSC, and such funds and the NL Funds and FESC Funds will fully disclose the terms and conditions of any applicable exchange privileges, in their respective prospectuses and statements of additional information.

7. No CDSC Fund which is not a party to the application nor its principal underwriter shall rely upon any order granted upon the application permitting imposition of the CDSC and waivers thereof unless shares of such funds are offered and sold on substantially the



same basis as shares of CSS are proposed to be sold.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-22878 Filed 10-2-87; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-16010; 812-6860]

**Application; Empire Life Insurance Co. et al.**

September 28, 1987.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for exemption under the Investment Company Act of 1940 (the "1940 Act").

*Applicants:* Empire Life Insurance Company (facilities Empire); Composite Deferred Variable Account (the "Variable Account"); and Murphey Favre, Inc. ("MFI")

*Relevant 1940 Act Sections:* Exemption requested under sections 6(c) from sections 26(a)(2) and 27(c)(2).

*Summary of Application:* Applicants seek an order to permit them to issue flexible premium deferred variable annuity contracts (the "Contracts") that permit a deduction of mortality and expense risk charges.

*Filing Date:* September 2, 1987.

*Hearing or Notification of Hearing:* If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on October 23, 1987. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant(s) with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicants' addresses: Empire and the Variable Account, 1000 Second Avenue, Seattle, Washington 98104, MFI, 601 Riverside Avenue Spokane, Washington 99201.

**FOR FURTHER INFORMATION CONTACT:** Jeffery M. Ulness, Attorney, (202) 272-2026 or Lewis B. Reich, Special Counsel (202) 272-2061 (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:**

Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

**Applicant's Representations**

1. Empire is a stock life insurance company that was incorporated under the laws of Nebraska in 1962. It is principally engaged in the sale of individual annuities and individual life insurance. Empire is a wholly-owned subsidiary of WM Life Insurance Company, which is a wholly-owned subsidiary of WM Financial, Inc., which in turn is wholly-owned by Washington Mutual Savings Bank.

2. The Variable Account was established by Empire as a separate account under the laws of Nebraska on July 23, 1987 and registered under the 1940 Act as a unit investment trust. The Variable Account was established in connection with the proposed issuance of certain individual flexible premium deferred variable annuity contracts ("Contracts").

3. The Variable Account will invest in shares of one or more of the investment portfolios of the Composite Deferred Series, Inc. (the "Fund"). The Fund, a diversified open-end management investment company, organized as a Washington corporation on December 8, 1986, has three portfolios: the Money Market portfolio, the Growth Portfolio, and the Income Portfolio. The Variable Account has three subaccounts, each of which invests in a corresponding portfolio of the Fund. MFI will serve as the distributor and Principal underwriter of the Contracts.

4. The Contracts are individual flexible premium deferred variable annuity contracts. The Contracts may be purchased with a first purchase payment of at least \$1,000. Subsequent purchase payments must be at least \$100. The contract owner can allocate purchase payments to one or more sub-accounts of the Variable Account, each of which will invest in a corresponding portfolio of the Fund. Purchase payments will be credited with the investment experience of the selected sub-account(s). Empire may establish new sub-accounts at its discretion. Each additional sub-account(s). Empire may establish new sub-accounts at its discretion, each additional sub-account will purchase shares in a portfolio of the Fund or in another mutual fund. Any new sub-account would be made available to existing contract owners on a basis to be determined by Empire. Empire may eliminate one or more sub-accounts if, in

its sole discretion, conditions so warrant. Prior to the income starting date, a contract holder may surrender the Contract in its entirety or withdraw a portion of the contract value. Transfers between sub-accounts of the Variable Account generally are permitted both prior to and subsequent to the income starting date.

5. An amount will be deducted from the daily net asset value of the Variable Account to reimburse Empire for certain mortality and expense risks assumed under the Contracts. The mortality risk born by Empire under the Contracts is the guarantee that the variable annuity payments made to contract owners will not be affected by the mortality experience (life span) of persons receiving such payments or of the general population. The expense risk undertaken by Empire is that the deductions for actual maintenance and distribution costs under the Contracts may be insufficient to cover the actual future costs incurred by Empire. This asset charge will be deducted from the contract value of each Contract daily in an amount equal to an effective annual rate of 1.20%. Of that amount, approximately .80 is allocable to the mortality risks, and .40 is allocable to the administrative and distribution expense risks. The rate of this charge is guaranteed and will not change.

6. Empire represents that the mortality and expense risk charge is a reasonable charge to compensate Empire for the risk that annuitants under the Contracts will live longer as group than has been anticipated in setting the annuity rates guaranteed in the Contracts for the risk that administrative expenses will be greater than the amounts derived from the administration charges and for the risk that the amounts realized from the surrender charge will be insufficient to cover actual sales and distribution expenses. Empire further represents that the charge of 1.20% for mortality and expense risks assumed by Empire is within the range of industry practice with respect to comparable annuity products. This representation is based upon Empire's analysis of publicly available information about similar industry products, taking into consideration such factors as current charge levels, existence of charge level guarantees, and guaranteed annuity rates. Empire represents that it will maintain at its administrative offices, and make available to the SEC, a memorandum setting forth in detail the products analyzed in the course of, and the methodology and results of, its comparative survey made to support this representation.



7. In certain cases a contingent deferred sales charge will be assessed upon surrender of a Contract or withdrawal of part of the contract value prior to the income starting date. The charge will be based on the elapsed time between the date of the purchase payment and the date of the surrender or partial withdrawal. For purposes of calculating the charge, Empire assumes that the purchase payments are withdrawn on a first-in, first-out basis, and that all purchase payments are withdrawn before any earnings are withdrawn.

The following surrender charges apply:

Elapsed time since date of purchase payment	Applicable surrender charge percentage
Less than 1 year.....	6
1 year, but less than 2 years.....	5
2 years, but less than 3 years.....	4
3 years, but less than 4 years.....	3
4 years, but less than 5 years.....	2
5 years, but less than 6 years.....	1
6 years or more.....	0

In no event, however, will the total sales charges for a particular Contract exceed 9% of the purchase payments for that Contract. Surrender charges will be used to pay sales commissions and other promotional or distribution expenses associated with the marketing of the Contracts. Applicants acknowledge that the surrender charge may be insufficient to cover all distribution expenses in connection with the Contract. Applicants also acknowledge that if a profit is realized from the mortality and expense risks charge, any such profit, as well as any of the profit realized by Empire and held in its general account, would be a variable for any proper Corporate purpose, including, but not limited to payment of distribution expenses.

8. In the event that a portion of the mortality and expense risk charge might be viewed as providing for a portion of the costs relating to the distribution of the Contracts, Empire has concluded that there is a reasonable likelihood that the proposed distribution financing arrangement will benefit the Variable Account and the contract owners. A memorandum setting forth the basis for this representation will be maintained by Empire at its administrative offices and will be available to the SEC. Furthermore, applicants also represent that the Variable Account will invest only in management investment companies which undertake, in the event that it should adopt any plan under Rule 12b-1 to finance distribution expenses, to have their board of directors (or trustees), a majority of

whom are not "interested persons" of the company, approve any plan under Rule 12b-1 to finance distribution expenses.

9. Empire will deduct a contract maintenance charge of \$2.50 per month. Prior to the income starting date, this charge will be deducted from the contract value on each contract monthly anniversary to compensate Empire for the administrative services provided to contract owners. After the income starting date, a contract maintenance charge of \$2.50 will be deducted from each income payment. Empire does not intend to profit from the contract maintenance charge.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-22881 Filed 10-2-87; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-16007; 812-6716]

#### Application; Shearson Lehman Special Equity Portfolios

September 28, 1987.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for exemption under the Investment Company Act of 1940 ("1940 Act").

*Applicant:* Shearson Lehman Special Equity Portfolios.

*Relevant 1940 Act Sections:* Amended Exemptive Order requested under section 8(c) exempting Applicant from the provisions of section 22(d) and Rule 22d-1.

*Summary of Application:* Applicant seeks an amended exemptive order to permit it to waive a contingent deferred sales charge currently assessed pursuant to an order granted to Applicant on March 18, 1986 (Investment Company Act Release No. 14999, the "1986 Order").

*Filing Date:* The application was filed on May 11, 1987 and amended on July 22, 1987.

*Hearing or Notification of Hearing:* If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on October 23, 1987. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request, either personally or by mail, and also send it to

the Secretary of the SEC, along with proof of service by affidavit or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant(s), Two World Trade Center, New York, NY 10048.

**FOR FURTHER INFORMATION CONTACT:** Joyce M. Pickholz, Staff Attorney, (202) 272-3046, or Curtis R. Hilliard, Special Counsel, (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

#### Applicant's Representations

1. Applicant is an open-end, diversified, management investment company that was organized as a business trust under the laws of the Commonwealth of Massachusetts on January 8, 1986. Applicant is a series company that is currently offering shares of four portfolios (the "Portfolios"). Shares of all of the Portfolios are distributed by Shearson Lehman Brothers Inc. ("Shearson Lehman"), and affiliates of Shearson Lehman serve as the investment advisors to the various Portfolios.

2. The 1986 Order exempted Applicant from (1) the provisions of sections 2(a)(32), 2(a)(35), 22(c) and 22(d) of the Act and Rules 22c-1 and 22d-1 under the Act to the extent necessary to permit Applicant to assess a contingent deferred sales charge (the "CDSC") on redemptions of the initial and future series of its shares to permit Applicant under certain circumstances to waive or apply credits against the CDSC, and (2) the provisions of section 11(a) of the Act of permit Applicant to offer to exchange shares of each of Applicant's series for shares of any other of Applicant's series or shares of any series of Shearson Lehman Special Income Portfolios, on the basis of relative net asset values per share of the relevant series at the time of the exchange, subject to a \$5.00 service charge on each exchange, which service charge is no longer assessed.

3. Applicant now proposes to waive the CDSC on redemptions affected by any shareholder who is a client of a Shearson Lehman Financial Consultant ("Financial Consultant") and who purchased shares of Applicant with the



redemption proceeds of shares of a registered investment company sponsored by the Financial Consultant's previous employer. Under Applicant's proposal, the CDSC would be waived only if (1) the shareholder's purchase of shares of a Portfolio was made within 90 days of the commencement of the Financial Consultant's employment with Shearson Lehman; (2) the purchase was made with proceeds of a redemption of shares of an investment company registered under the Act that was sponsored by the Financial Consultant's previous employer (the "Previous Fund"); (3) the Financial Consultant served as the shareholder's broker on the purchase of the shares of the Previous Fund; and (4) the shares of the Previous Fund were subject to a sales or redemption charge. To ensure that the shares of a Portfolio are purchased with the proceeds of a redemption of shares of a Previous Fund, the shareholder would be required to provide Shearson Lehman with a copy of a confirmation slip or customer statement evidencing the redemption.

4. Applicant requests that any exemption the Commission may grant cover not only Portfolios, but also any additional series or classes of shares Applicant may offer in the future on substantially the same basis as Applicant offers the shares of the Portfolios.

5. Shearson Lehman believes that the purchase of shares of a Shearson Lehman fund by a client of a Financial Consultant with the redemption proceeds of a fund sponsored by the Financial Consultant's previous employer typically involves little or no selling effort by the Financial Consultant, and as a result, under Shearson Lehman's internal policies, the Financial Consultant receives no compensation with respect to the purchase.

#### Applicant's Legal Conclusions

1. Applicant submits that the waiver of the CDSC is consistent with the policies underlying section 22(d) of the Act, which prohibits an investment company registered under the Act from selling its redeemable securities other than at a current public offering price described in the company's prospectus. Applicant also believes that the waivers from the CDSC will not harm Applicant or its shareholders or unfairly discriminate among shareholders or purchasers. In light of the lack of selling effort involved, Applicant believes it appropriate to waive the CDSC on a redemption by a client of a Shearson Lehman Financial Consultant of shares of a Portfolio purchased with the

redemption proceeds of a fund sponsored by the Financial Consultant's previous employer.

#### Applicant's Conditions

Applicant expressly agrees that the proposed transactions will conform to the following conditions.

1. Applicant will implement the waiver of the CDSC in accordance with the terms of Rule 22d-1 under the 1940 Act.
2. Applicant will comply with the provisions of proposed Rule 11a-3 under the 1940 Act if and when it is adopted by the Commission.
3. Applicant will comply with the provisions of Rule 12b-1 under the 1940 Act in its present form and as it may be revised in the future.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-228 Filed 10-2-87; 8:45 am]

BILLING CODE 8010-01-M

[File No. 1-6761]

#### Issuer Delisting; Application To Withdraw From Listing and Registration; Wickes Companies, Inc. (Common Stock, Par Value \$0.10 Per Share, \$2.50 Convertible Preferred Stock, Series A, Par Value \$0.10 per Share, and Warrants To Purchase Common Stock, Par Value \$0.10 Per Warrant)

September 29, 1987.

Wickes Companies, Inc. ("Company"), has filed an application with the Securities and Exchange Commission pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2-2(d) promulgated thereunder, to withdraw the above specified securities from listing and registration on the American Stock Exchange, Inc. ("Amex").

The reasons alleged in the application for withdrawing these securities from listing and registration include the following:

The \$0.10 par value common stock, \$0.10 par value preferred stock and common stock purchase warrants of the Company (the "Equity Securities") have been listed for trading on the Amex and, pursuant to a Registration Statement on Form 8-A which became effective on August 11, 1987, the NYSE. Trading in the Company's Equity Securities on the NYSE commenced at the opening of business on August 12, 1987, and concurrently therewith the Equity

Securities were suspended from trading on the Amex.

In making the decision to withdraw its Equity Securities from listing on the Amex, the Company considered the direct and indirect costs and expenses attendant on maintaining the dual listing of said securities on the NYSE and Amex. The Company does not see any particular advantage in the dual trading of its stock and believes that dual listing would fragment the market for its Equity Securities.

Any interested person may, on or before October 20, 1987, submit by letter to the Secretary of the Securities and Exchange Commission, Washington, DC 20549, facts bearing upon whether the application has been made in accordance with the rules of the Exchange and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 87-22883 Filed 10-2-87; 8:45 am]

BILLING CODE 1010-01-M

#### SMALL BUSINESS ADMINISTRATION

##### Action Subject to Intergovernmental Review

**AGENCY:** Small Business Administration.

**ACTION:** Notice of action subject to Intergovernmental Review Under Executive Order 12372.

**SUMMARY:** This notice provides for public awareness of SBA's intention to fund for the first time five additional Small Business Development Centers (SBDCs) during fiscal year 1988, subject to availability of funds. Currently, there are 49 SBDCs operating in the SBDC program. The following SBDCs are intended to be funded: Arizona, Colorado, Maryland, Montana, and New Mexico. This notice also provides a description of the SBDC program by setting forth a condensed version of the program announcement which has been furnished to each of the proposal developers for the SBDCs expected to be funded. This publication is being made to provide the State single points of contact, designated pursuant to Executive Order 12372, and other



interested State and local entities, the opportunity to comment on the proposed funding in accord with the Executive Order and SBA's regulations found at 13 CFR Part 135.

**DATE:** Comments will be accepted through December 4, 1987.

**ADDRESS:** Comments should be addressed to Ms. Janice E. Wolfe, Deputy Associate Administrator for Business Development for SBDC Programs, U.S. Small Business Administration, 1441 L Street NW., Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Ms. Janice E. Wolfe, (202) 634-1805. C.T. SBA is bound by the provisions of Executive Order 12372, "Intergovernmental Review of Federal Programs." SBA has promulgated regulations spelling out its obligations under that Executive Order. See 13 CFR Part 135, effective September 30, 1983.

In accord with these regulations, specifically § 135.4, SBA is publishing this notice to provide public awareness of the pending applications for funding of five proposed Small Business Development Centers (SBDCs). Also, published herewith is an annotated program announcement describing the SBDC program in detail.

The proposed SBDCs will be funded at the earliest practicable date following the 60-day comment period. However, no funding will occur unless all comments have been considered. Relevant information identifying the five proposed SBDCs and providing the mailing address of the proposal developers is provided below. In addition to this publication, a copy of this notice is being simultaneously furnished to each of the affected State single points of contact which have been established under the Executive Order.

The State single points of contact and other interested State and local entities are expected to advise the relevant proposal developer of their comments regarding the proposed funding in writing as soon as possible. An SBDC proposal cannot be inconsistent with an area-wide plan to provide assistance to small business, if there is one, which has been adopted by an agency recognized by the State government as authorized to do so. Copies of such written comments should also be furnished to Ms. Janice E. Wolfe, Deputy Associate Administrator for Business Development for SBDC Programs, U.S. Small Business Administration, 1441 L Street NW., Washington, DC 20416. Comments will be accepted by the proposal developer and SBA for a period of two months (60 days) from the date of publication of this notice. The proposal developer will

make every effort to accommodate these comments during the 60-day period. If the comments cannot be accommodated by the proposal developer, SBA will, prior to funding the proposed SBDC, either attain accommodation of any comments or furnish an explanation to the commenter of why accommodation cannot be attained to the commenter prior to funding the proposed SBDC.

#### Description of the SBDC Program

The Small Business Development Center Program is a major management assistance delivery program of the U.S. Small Business Administration. SBDCs are authorized under section 21 of the Small Business Act (15 U.S.C. 648). SBDCs operate pursuant to the provisions of section 21, a Notice of Award (Cooperative Agreement) issued by SBA, and a Program Announcement. The Program represents a partnership between SBA and the State-endorsed organization receiving Federal assistance for its operation. SBDCs operate on the basis of a State plan which provides small business assistance throughout the State. As a condition to any financial award made to an applicant, an additional amount equal to the amount of assistance provided by SBA must be provided to the SBDC from sources other than the Federal Government.

#### Purpose and Scope

The SBDC Program has been designed to meet the specialized and complex management and technical assistance needs of the small business community. SBDCs focus on providing indepth quality assistance to small businesses in all areas which promote growth, expansion, innovation, increased productivity and management improvement. SBDCs act in an advocacy role to promote local small business interests. SBDCs concentrate on developing the unique resources of the university system, the private sector, and State and local governments to provide services to the small business community which are not available elsewhere. SBDCs coordinate with other SBA programs of management assistance and utilize the expertise of these affiliated resources to expand services and avoid duplication of effort.

#### Program Objectives

The overall objective of the SBDC Program is to leverage Federal dollars and resources with those of the State academic community and private sector to:

(a) Strengthen the small business community;

(b) Contribute to the growth of the communities served;

(c) Make assistance available to more small businesses than is now possible with present Federal resources; and

(d) Create a broader based delivery system to the small business community.

#### SBDC Program Organization

SBDCs are organized to provide maximum services to the local small business community. The lead SBDC receives financial assistance from the SBA to operate a statewide SBDC Program. In States where more than one organization receives SBA financial assistance to operate an SBDC, each lead SBDC is responsible for Program operations throughout a specific regional area to be served by the SBDC. The lead SBDC is responsible for establishing a network of SBDC subcenters to offer service coverage to the small business community. The SBDC network is managed and directed by a single full-time Director. SBDCs must ensure that at least 80 percent of Federal funds provided are used to provide services to small businesses. To the extent possible, SBDCs provide services by enlisting volunteer and other low cost resources on a statewide basis.

#### SBDC Services

The specific types of services to be offered are developed in coordination with the SBA district office which has jurisdiction over a given SBDC. SBDCs emphasize the provision of indepth, high-quality assistance to small business owners or prospective small business owners in complex areas that require specialized expertise. These areas may include, but are not limited to: Management, marketing, financing, accounting, strategic planning, regulation and taxation, capital formation, procurement assistance, human resource management, production, operations, economic and business data analysis, engineering, technology transfer, innovation and research, new product development, product analysis, plant layout and design, agri-business, computer application, business law information, and referral (any legal services beyond basic legal information and referral require the endorsement of the State Bar Association), exporting, office automation, site selection, or any other areas of assistance required to promote small business growth, expansion, and productivity within the State.

The degree to which SBDC resources are directed toward specific areas of assistance is determined by local community needs, SBA priorities, and



SBDC Program objectives and agreed upon by the SBA district office and the SBDC.

The SBDC must offer quality training to improve the skills and knowledge of existing and prospective small business owners. As a general guideline, SBDCs should emphasize the provision of training in specialized areas other than basic small business management subjects. SBDCs should also emphasize training designed to reach particular audiences such as members of SBA priority and special emphasis groups.

#### SBDC Program Requirements

The SBDC is responsible to the SBA for ensuring that all programmatic and financial requirements imposed upon them by statute or agreement are met. The SBDC must assure that quality assistance and training in management and technical areas is provided to the State small business community through the State SBDC network. As a condition of this agreement, the SBDC must perform, but not be limited to, the following activities.

(a) The SBDC ensures that services are provided as close as possible to small business population centers. This is accomplished through the establishment of SBDC subcenters.

(b) The SBDC ensures that lists of local and regional private consultants are maintained at the lead SBDC and each SBDC subcenter. The SBDC utilizes and provides compensation to qualified small business vendors such as private management consultants, private consulting engineers, and private testing laboratories.

(c) The SBDC is responsible for the development and expansion of resources within the State, particularly the development of new resources to assist small businesses that are not presently associated with the SBA district office.

(d) The SBDC ensures that working relationships and open communications exist within the financial and investment communities, and with legal associations, private consultants, as well as small business groups and associations to help address the needs of the small business community.

(e) The SBDC ensures that assistance is provided to SBA special emphasis groups throughout the SBDC network. This assistance shall be provided to veterans, women, exporters, the handicapped, and minorities as well as any other groups designated a priority by SBA. Services provided to special emphasis groups shall be performed as part of the Cooperative Agreement.

#### Advance Understandings.

(a) Lead SBDCs shall operate on a 40-hour week basis, or during normal State business hours, with National holidays or State holidays as applicable excluded.

(b) SBDC subcenters shall be operated on a full-time basis. The lead SBDC shall ensure that staffing is adequate to meet the needs of the small business community.

(c) All counseling assistance offered through the Small Business Development Center network shall be provided at no cost to the client.

Date: September 21, 1987.

James Abdnor,  
Administrator.

#### Address of Proposed SBDCs and Proposal Developers

Dr. Robert Huddleston, Dean of Instructions,  
Gateway Community College, 108 N. 40th  
Street, Phoenix, AZ 85034, (602) 275-8500

Mr. Richard E. Wilson, Special Assistant to  
the President, Colorado Community College  
and Occupational Education System, 1313  
Sherman Street, #221, Denver, CO 80203,  
(303) 866-3151

Ms. Jean F. Duley, Administrator, Office of  
Business and Industrial Development, 45  
Calvert Street, Annapolis, MD 21401, (301)  
974-2945

Ms. Carol Daily, Administrator, Business  
Assistance Division, Montana Department  
of Commerce, Capital Station, 1424 9th  
Avenue, Helena, MT 59620, (406) 444-4380

Mr. Nick Jenkins, Secretary, New Mexico  
Department of Economic Development and  
Tourism, Joseph Montoya Building, 1100 St.  
Francis, Santa Fe, NM 87503, (505) 827-  
0305.

[FR Doc. 87-22574 Filed 10-2-87; 8:45 am]

BILLING CODE 8025-01-M

#### Reporting and Recordkeeping Requirements Under OMB Review

**ACTION:** Notice of reporting requirements submitted for review.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the *Federal Register* notifying the public that the agency had made such a submission.

**DATE:** Comments should be submitted by November 4, 1987. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (S.F. 83), supporting statement, and other documents submitted to OMB for review

may be obtained from the Agency Clearance Officer. Submit comments to the Agency Clearance Officer and the OMB Reviewer.

#### FOR FURTHER INFORMATION CONTACT:

Agency Clearance Officer: William Cline, Small Business Administration, 1441 L Street NW., Room 200, Washington, DC 20416, Telephone: (202) 653-8538

OMB Reviewer: Robert Neal, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Telephone: (202) 395-7340.

Title: Disaster Home Loan Interview and Referral Request.

Frequency: On occasion.

Description of Respondents:

Information is collected at the time of a request for assistance from a victim.

Annual Responses: 2,178.

Annual Burden Hours: 545.

Type of Request: Extension.

September 28, 1987.

William Cline,

Chief, Administrative Information Branch,  
Small Business Administration.

[FR Doc. 87-22960 Filed 10-2-87; 8:45 am]

BILLING CODE 8025-01-M

#### Application No. 02/02/0510

#### Application for a License to Operate as a Small Business Investment Company; Diamond Capital Corp.

Notice is hereby given of the filing of an application with the Small Business Administration (SBA), pursuant to § 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1987)), by Diamond Capital Corporation (the Applicant), 805 Third Avenue, Suite 1100, New York, New York 10017, for a license to operate as a small business investment company (SBIC) under the provisions of the Small Business Investment Act of 1958, as amended (the Act), (15 U.S.C. 661 *et seq.*), and the Rules and Regulations promulgated thereunder.

The proposed officers and directors and principle stockholders of the Applicant are as follows:

Name	Title or relationship	(Percent)
Lawrence M. Goodman, 219 East 69th Street, New York, New York 10021.	Chairman of the Board, Director.	25.5



Name	Title or relationship	(Percent)
Martin S. Levine, 1365 York Avenue, New York, New York 10021.	Vice Chairman Director.	12.75
Cynthia G. Levine, 1365 York Avenue, New York, New York 10021.	Vice Chairman, Director.	12.75
Steven D. Kravitz, 353 East 83rd Street, New York, New York 10028.	President, Treasurer, and Director.	12.25
Diana T. Ortado, 2686 Ocean Avenue, Brooklyn, New York 11229.	Executive Vice President, Secretary, and Director.	12.25
Jeffery C. Stern, 171 East 84th Street, New York, New York 10028.	Director .....	6.125
Henry F. Hewes, 1601 Third Avenue, New York, New York 10128.	Director .....	6.125
Pietro Ferrara, 2064 West 6th Street, Brooklyn, New York 11223.	Director .....	6.125
Gregory G. Brown, 345 East 80th Street, New York, New York 10021.	Director .....	6.125

The Applicant, a corporation organized under the laws of the State of New York, will begin operations with approximately \$2,000,000 of paid-in capital and paid-in surplus to be obtained through a private placement.

The applicant will conduct its activities in the State of New York and will consider investments in businesses in other areas of the United States.

Matters involved in SBA's consideration of the application include the general business reputation and character of the proposed owners and management, and the probability of successful operations of the Applicant under their management including adequate profitability and financial soundness, in accordance with the Act and the SBA Rules and Regulations.

Notice is further given that any person may, no later than 30 days from the date of publication of this Notice, submit

written comments on the proposed SBIC to the Deputy Associate Administrator for Investment, Small Business Administration, 1441 L Street NW., Washington, DC 20416.

A copy of this Notice will be published in a newspaper of general circulation in the New York City area.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: September 28, 1987.

**Robert G. Lineberry,**  
*Deputy Associate Administrator for Investment.*

[FR Doc. 87-22970 Filed 10-2-87; 8:45 am]

BILLING CODE 8025-01-M

#### [License No. 02/02-5437]

#### License Surrender; Fans Capital Corp.

Notice is hereby given that Fans Capital Corporation, 136-40 39 Avenue, Flushing, New York 11354, has surrendered its license to operate as a small business investment company under section 301(d) the Small Business Investment Act of 1958, as amended (the Act). Fans Capital Corporation was licensed by the Small Business Administration on September 26, 1986.

Under the authority vested by the Act and pursuant to the Regulations promulgated thereunder, the surrender of the license was accepted on August 19, 1987, and, accordingly, all rights, privileges, and franchises derived therefrom have been terminated.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

**Robert G. Lineberry,**  
*Deputy Associate Administrator for Investment.*

Dated: September 28, 1987.

[FR Doc. 87-22961 Filed 10-2-87; 8:45 am]

BILLING CODE 8025-01-M

#### Las Vegas District Advisory Council; Public Meeting

The Small Business Administration, Las Vegas District Advisory Council will hold a public meeting Thursday, October 22, 1987, at the Small Business Administration Office, located at 301 East Stewart Ave., Downtown Station, Post Office, 3rd Floor, Las Vegas, Nevada, from 10:00 a.m. to 12:00 noon to discuss such matters as may be presented by Council members, staff of the Small Business Administration, or others present.

For further information, write Elizabeth Sutton, Secretary for the

Advisory Council, U.S. Small Business Administration, 301 East Stewart, Post Office Box 7527, Las Vegas, Nevada 89125, or call (702) 388-6616.

**Jean M. Nowak,**  
*Director, Office of Advisory Councils.*  
September 24, 1987.

[FR Doc. 87-22965 Filed 10-2-87; 8:45 am]

BILLING CODE 8025-01-M

#### Region I Advisory Council; Public Meeting

The U.S. Small Business Administration Region I Advisory Council, located in the geographical area of Providence, Rhode Island, will hold a public meeting on Tuesday, October 20, 1987 at 11:30 a.m. at Winklers' Steak House, Washington Street, Providence, Rhode Island to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call the District Director, Providence District Office, 380 Westminster Mall, Providence, Rhode Island 02903, (401) 528-4580.

**Jean M. Nowak,**  
*Director, Office of Advisory Councils.*  
September 25, 1987.

[FR Doc. 87-22968 Filed 10-2-87; 8:45 am]

BILLING CODE 8025-01-M

#### Region I Advisory Council; Public Meeting

The U.S. Small Business Administration Region I Advisory Council, located in the geographical area of Boston, will hold a public meeting at 1:00 p.m. on Thursday, October 22, 1987 at the Thomas P. O'Neil, Jr., Federal Building, Room 265, 10 Causeway Street, Boston, MA. 02222-1093, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information call John J. McNally, Jr., District Director, U.S. Small Business Administration, 10 Causeway Street, Room 265, Boston Massachusetts 02222-1093. (617) 565-5561.

**Jean M. Nowak,**  
*Director, Office of Advisory Councils.*  
September 24, 1987.

[FR Doc. 87-22964 Filed 10-2-87; 8:45 am]

BILLING CODE 8025-01-M



**Region II Advisory Council; Public Meeting**

The U.S. Small Business Administration, Region II Advisory Council, located in the geographical area of Newark, New Jersey, will hold a public meeting at 8:30 a.m., on Monday, November 9, 1987, at the Headquarters of Bellcore, Bell Communications Research, 290 West Mount Pleasant Avenue, Livingston, New Jersey to discuss such matters as may be presented by members, and the staff of the U.S. Small Business Administration, or others present.

For further information write or call Stanley H. Salt, District Director, U.S. Small Business Administration, 60 Park Place, Newark, New Jersey, 07102, (201) 645-3580.

Jean M. Nowak,  
Director, Office of Advisory Council.  
September 25, 1987.

[FR Doc. 87-22966 Filed 10-2-87; 8:45 am]  
BILLING CODE 8025-01-M

**Region IV Advisory Council; Public Meeting**

The Small Business Administration Region IV Advisory Council, located in the geographical area of North Carolina, will hold a public meeting at 2:00 p.m. on Thursday, October 22, 1987, at the Charlotte Chamber of Commerce, 129 West Trade Street, Charlotte, NC 28202, to discuss such business as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Gary A. Keel, District Director, U.S. Small Business Administration, 222 S. Church St., Suite 300, Charlotte, NC 28202, (704) 371-6561.

Jean M. Nowak,  
Director, Office of Advisory Councils.  
September 24, 1987.

[FR Doc. 87-22967 Filed 10-2-87; 8:45 am]  
BILLING CODE 8025-01-M

**Region V Advisory Council; Public Meeting**

The U.S. Small Business Administration Region V Advisory Council, located in the geographical area of Chicago, will hold a public meeting at 10:00 a.m., Friday, October 23, 1987, at 219 South Dearborn, Dirksen Federal Building, Room 1220, Chicago, Illinois, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

Further information may be obtained by writing or calling John L. Smith, District Director, U.S. Small Business Administration, 219 South Dearborn, St., Room 437, Chicago, Illinois, 312/353-4508.

Jean M. Nowak,  
Director, Office of Advisory Councils.  
September 24, 1987.

[FR Doc. 87-22963 Filed 10-2-87; 8:45 am]  
BILLING CODE 8025-01-M

**Region IX Advisory Council; Public Meeting**

The U.S. Small Business Administration Region IX Advisory Council, located in the geographical area of Fresno, will hold a public meeting at 9:00 a.m. on October 28, 1987, at the Fresno District Office, 2202 Monterey Street, Suite 108 Fresno, California to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Mr. Peter J. Bergin, District Director, U.S. Small Business Administration, 2202 Monterey Street, Suite 108, Fresno, California, 93721, (209) 487-5791.

Jean M. Nowak,  
Director, Office of Advisory Councils.  
September 25, 1987.

[FR Doc. 87-22962 Filed 10-2-87; 8:45 am]  
BILLING CODE 8025-01-M

**Maximum Annual Cost of Money to Small Business Concerns; Debenture Rate**

13 CFR 107.302 (a) and (b) limit maximum annual Cost of Money (as defined in 13 CFR 107.3) that may be imposed upon a Small Concern in connection with Financing by means of Loans or through the purchase of Debt Securities. The cited regulation incorporates the term "Debenture Rate" which is defined elsewhere in 13 CFR 107.3 in terms that require SBA to publish, from time to time, the rate charged on ten-year debentures sold by Licensees to the public. Notice of this rate will be published upon change in the Debenture Rate.

Accordingly, Licensees are hereby notified that effective the date of publication of this Notice, and until further notice, the Debenture Rate to be used for computation of maximum cost of money pursuant to 13 CFR 107.302 (a) and (b) is 10.35% per annum.

13 CFR 107.302 does not supersede or preempt any applicable law imposing an interest ceiling lower than the ceiling

imposed by its own terms. Attention is directed to section 308(i) of the Small Business Investment Act, as further amended by section 1 of Pub. L. 99-226, December 28, 1985 (99 Stat. 1744), to that law's Federal override of State usury ceilings, and to its forfeiture and penalty provisions.

Dated: September 29, 1987.

Robert G. Lineberry,  
Deputy Associate Administrator for Investment.

[FR Doc. 87-22969 Filed 10-2-87; 8:45 am]  
BILLING CODE 8025-01-M

**UNITED STATES TRADE REPRESENTATIVE****Request for Public Comments in Connection With Presidential Review of Exclusion Order Under Section 337**

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Request for public comments on a limited exclusion order issued by the U.S. International Trade Commission (ITC) in *Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, Inv. No. 337-TA-242.

**SUMMARY:** On September 28, 1987, the Commission referred to the President for review its determination in the above-referenced investigation that there is a violation of section 337 of the Tariff Act of 1930, in the unauthorized importation into the United States, and in their sale, of dynamic random access memories (DRAMs) which infringe patents owned by Texas Instruments, Inc. (TI) of Dallas, Texas.

The ITC has issued a limited exclusion order prohibiting the unauthorized entry of infringing DRAMs of 64 and 256 kilobits (and any combination thereof such as 128 kilobits) manufactured by Samsung Co., Ltd., and/or Samsung Semiconductor & Telecommunications Co., Ltd., (Samsung) whether assembled or unassembled. The exclusion order also prohibits the entry, except under license, of the specified DRAMs incorporated into a carrier of any form, including Single-Inline-Packages and Single-Inline-Modules, or assembled onto circuit boards of any configuration including memory expansion boards.

Computers such as mainframe, personal, and small business computers, facsimile machines, telecommunications switching equipment, and printers containing any 64 or 256 kilobit (or any combination thereof such as 128 kilobits) DRAMs manufactured by



Samsung are excluded from entry into the United States except under license from TI.

Finally, the ITC order provides that the U.S. Customs Service may specify procedures to be used by persons seeking to import products identified in the order to certify that importers "have made appropriate inquiry and thereupon state that to the best of their knowledge and belief any DRAMs incorporated into, assembled onto, or contained in such products are not covered by this Order." For example, importers of personal computers must certify that the imported computer does not to the best of their knowledge and belief contain any DRAMs manufactured by Samsung.

Under section 337(g), the President, for policy reasons, may disapprove the ITC's determination within 60 days following receipt of the determination and record. If disapproved by the President, the determination, and any order issued under its authority, would be without force or effect. The President also may approve the ITC's determination rendering the determination and order final on the date that the ITC receives notice of the approval. If the President takes no action to approve or disapprove the determination and order, they become final automatically following the 60-day review period.

Interested parties may submit comments concerning foreign or domestic policy issues that should be considered by the President in making his decision regarding the ITC order. In particular, we invite parties to address the scope and enforceability of the order and the effect of the order on legitimate trade. Parties commenting on domestic policy issues should specifically refer to the portion of the Commission's record related to that issue. If the domestic policy issue was not raised before the Commission, parties should provide a rationale for that omission.

Comments may not exceed 15 letter-sized pages, including attachments. Parties must provide twenty copies of the submission to the Secretary, Trade Policy Staff Committee, Room 521, 600 17th Street, NW., Washington, DC 20506. All submissions must be received by close of business, October 14, 1987.

**FOR FURTHER INFORMATION CONTACT:**  
Catherine R. Field, Assistant General Counsel, Office of the U.S. Trade Representative, (202) 395-3432.

Donald M. Phillips,  
Chairman, Trade Policy Staff Committee.  
[FR Doc. 87-23154 Filed 10-2-87; 12:39 pm]  
BILLING CODE 3190-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Environmental Impact Statement, Philadelphia County, PA

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for a proposed highway project in Philadelphia County, Pennsylvania.

**FOR FURTHER INFORMATION CONTACT:**  
Philibert A. Ouellet, District Engineer,  
Federal Highway Administration, 228  
Walnut Street, P.O. Box 1086,  
Harrisburg, Pennsylvania 17108,  
Telephone: (717) 782-4422,

or

Timothy R. O'Brien, Project Manager,  
Pennsylvania Department of  
Transportation, 200 Radnor-Chester  
Road, St. Davids, Pennsylvania 19087,  
Telephone: (215) 964-6611.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Pennsylvania Department of Transportation, will prepare an Environmental Impact Statement on a proposal to extend Woodhaven Road (Legislative Route 1029, State Route 0063) from its present terminus at an intersection with Roosevelt Boulevard (Legislative Route 67009, State Route 0001) to an intersection with Philmont Avenue (Legislative Route 198, State Route 2013). The proposed 1.5 mile extension project involves studying a three staged construction: (I) Byberry Road Bridge replacement and relocated Byberry Road; (II) Woodhaven Road from Roosevelt Boulevard to Bustleton Avenue; and (III) Woodhaven Road from Bustleton Avenue to Philmont

Avenue. This proposed project will reduce congestion as well as provide better access for the surrounding businesses.

There will be three (3) alternatives studied: (1) No Build; (2) Limited Access Facility; and (3) At-Grade Arterial.

The various alternatives and their impacts to the environment will be assessed in detail as they relate to the areas of air quality, noise pollution, historical and archaeological resources, traffic/transportation/energy, water resources, social and economic considerations, land use, and terrestrial ecology. In addition, the E.I.S. will contain a cost analysis of the various alternatives, preliminary engineering information and documentation of the public and agency consultation and coordination process.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State and Local agencies, and to private organizations and citizens who express interest in the proposal. Scoping meetings are planned with the agencies between October 1987 and December 1987. Public meetings will be held in the project area during the fall of 1987 and spring of 1988. Public notices of the time and place of these meetings, and any required public hearings, will be given. Public involvement and interagency coordination will be maintained throughout the development of the Environmental Impact Statement.

To ensure that the full range of issues related to this proposed action are addressed and that all significant issues are identified, comments or questions concerning this action and the EIS should be directed to the FHWA or PennDOT at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The provisions of Executive Order 12372, Intergovernmental Review of Federal Programs, regarding State and local review of Federal and Federally assisted programs and projects apply to this program.)

Issued on: September 28, 1987.

Manuel A. Marks,  
Division Administrator, Harrisburg,  
Pennsylvania.

[FR Doc. 87-22895 Filed 10-2-87; 8:45 am]  
BILLING CODE 4910-22-M



# Sunshine Act Meetings

Federal Register

Vol. 52, No. 192

Monday, October 5, 1987

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

## COUNCIL ON ENVIRONMENTAL QUALITY

**DATE, TIME, PLACE:** Thursday, October 22, 1987, 2:00 pm, Council on Environmental Quality Conference Room, First Floor, 722 Jackson Place, NW., Washington, DC 20503.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** 1. The Council on Environmental Quality has held a series of public meetings on the issues of stratospheric ozone depletion and global warming. The Council has heard and will hear from experts concerning the scientific aspects of the problem and the human health impacts.

At this meeting, the Council will be hearing a presentation by Dr. Alan Teramura, Department of Botany, University of Maryland. Dr. Teramura will address the biological and terrestrial impacts of stratospheric ozone depletion.

The discussion will be limited to Dr. Teramura, the Council, and Council staff. Questions from the public will not be entertained.

2. Other matters may be discussed.

**FOR FURTHER INFORMATION CONTACT:** Lucinda Low Swartz, Deputy General Counsel, Council on Environmental Quality, 722 Jackson Place, NW., Washington, DC 20503. Telephone: (202) 395-5754.

Date: September 28, 1987.

A. Alan Hill,

Chairman.

[FR Doc. 87-23007 Filed 10-1-87; 12:48 pm]

BILLING CODE 3125-01-M

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** Federal Reg. No. 36493, Vol. 52, No. 18, Dated: Tuesday, September 29, 1987.

### Correction of Time of Meeting

**PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING:** 2:00 p.m. (Eastern Time), Tuesday, October 6, 1987.

**CHANGE IN THE MEETING:** Correct Time: 9:30 a.m. (Eastern Time), Tuesday, October 6, 1987.

**CONTACT PERSON FOR MORE INFORMATION:** Cynthia C. Matthews, Executive Officer (Acting), Executive Secretariat, (202) 634-6748.

Date: October 1, 1987.

Cynthia C. Matthews

Executive Officer (Acting), Executive Secretariat.

[FR Doc. 87-23042 Filed 10-1-87; 3:04 pm]

BILLING CODE 6750-06-M

## FARM CREDIT ADMINISTRATION

**SUMMARY:** Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the forthcoming regular meeting of the Farm Credit Administration Board (Board).

The regular meeting of the Board is scheduled for October 6, 1987.

**DATE AND TIME:** The meeting is scheduled to be held at the offices of the Farm Credit Administration in McLean, Virginia, on October 6, 1987, from 10:00 a.m. until such time as the Board may conclude its business.

**FOR FURTHER INFORMATION CONTACT:** David A. Hill, Secretary to the Farm Credit Administration Board, 1501 Farm Credit Drive, McLean, Virginia 22102-5090 (703-883-4010).

**ADDRESS:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090.

**SUPPLEMENTARY INFORMATION:** Parts of this meeting of the Board will be open to the public (limited space available), and parts of the meeting will be closed to the public. The matters to be considered at the meeting are:

1. Summary Prior Approval Items.
2. Consideration of the FCA Budget for Fiscal Years 1988 and 1989.
3. Effects of Districtwide Merger Activities on Farm Credit System Institutions and Election Procedures.
- \*4. Certification Under Section 4.28(j) of the Farm Credit Act of 1971, as amended.
- \*5. Examination and Enforcement Matters.

Dated: September 30, 1987.

David A. Hill,

Secretary, Farm Credit Administration.

\*Session closed to the public-exempt pursuant to 5 U.S.C. 552b(c) (4), (8) and (9).

[FR Doc. 87-22959 Filed 9-30-87; 4:38 pm]

BILLING CODE 6705-01-M



# Corrections

Federal Register

Vol. 52, No. 192

Monday, October 5, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## DEPARTMENT OF COMMERCE

### International Trade Administration

#### Initiation of Antidumping and Countervailing Duty Administrative Reviews

##### Correction

In notice document 87-18957 beginning on page 31056 in the issue of Wednesday, August 19, 1987, make the following correction:

On page 31057, in the first column, in the table, in the entry for "Leather wearing apparel from Uruguay", in the right hand column, "06/30/87" should read "12/31/86".

BILLING CODE 1505-01-D

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

[PP 7F3508/R903; FRL-3252-9]

#### Tolerance Exemption; Monourea Sulfuric Acid Adduct

##### Correction

In rule document 87-19647 beginning on page 32305 in the issue of Thursday, August 27, 1987, make the following corrections:

On page 32306, in the first column—

##### § 180.1084 [Corrected]

1. In the section heading, in the second line, "requirements" should read "requirement".

2. In § 180.1084, in the third line, "as herbicide or" should read "as a herbicide or".

BILLING CODE 1505-01-D

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 799

[OPTS-42061A; FRL-3130-8(a)]

#### Oleylamine; Testing Requirements

##### Correction

In rule document 87-19309 beginning on page 31962 in the issue of Monday, August 24, 1987, make the following correction:

On page 31962, in the third column, in the second line, "0.5x<sup>4</sup> mm Hg" should read "0.5x10<sup>4</sup> mm Hg".

BILLING CODE 1505-01-D

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

[PP 7E3482, 7E3483, 7E3484/P425; FRL-3252-4]

#### Pesticide Tolerance for Malathion

##### Correction

In proposed rule document 87-19652 beginning on page 32322 in the issue of Thursday, August 27, 1987, make the following correction:

##### § 180.111 [Corrected]

On page 32323, in the second column, in § 180.111, in the last line of the table, under "Parts per million", insert "8".

BILLING CODE 1505-01-D

## ENVIRONMENTAL PROTECTION AGENCY

[OPTS-59249; FRL-3254-8]

#### Acrylic Acid, 2-Allylphenol Polymer, Sodium Salt; Test Market Exemption Application

##### Correction

In notice document 87-20136 appearing on page 33638 in the issue of Friday, September 4, 1987, make the following corrections:

1. In the first column, in **ADDRESS**, in the fifth line, "(TS-794)" should read "(TS-790)".

2. In the second column, in the second line, "(TS-790)" should read "(TS-794)".

BILLING CODE 1505-01-D

## ENVIRONMENTAL PROTECTION AGENCY

[OPP-180742; FRL-3253-3]

#### Emergency Exemptions

##### Correction

In notice document 87-19655 beginning on page 32341 in the issue of Thursday, August 27, 1987, make the following corrections:

1. On page 32341, in the third column, in paragraph 19., in the 14th line, "is" should read "in".

2. On page 32342, in the first column, in paragraph 34., in the second line, "cranberries" should read "caneberries".

BILLING CODE 1505-01-D

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[MT-930-07-4212-13; M-72221]

#### Realty Action; Exchange of Public and Private Lands, Valley and Phillips Counties, MT

##### Correction

In notice document 87-16230 beginning on page 27065 in the issue of Friday, July 17, 1987, make the following land description correction:

On page 27066, in the first column, under the first **Principal Meridian** Montana, under "T. 31 N., R. 40 E.", the second line should read: "Sec. 5, SE $\frac{1}{4}$ NE $\frac{1}{4}$ ,".

BILLING CODE 1505-01-D



# Test Report Federal

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Monday  
October 5, 1987

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## Part II

## Environmental Protection Agency

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Initiation of Special Review; Oxydemeton-  
methyl



# ENVIRONMENTAL PROTECTION AGENCY

[OPP-30000/55; FRL-3273-1]

## Initiation of Special Review; Oxydemeton-Methyl

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of initiation of special review.

**SUMMARY:** This Notice announces that EPA is initiating a Special Review on all pesticide products containing oxydemeton-methyl (ODM). Oxydemeton-methyl is the common, chemical name for S-[2-(ethylsulfanyl)ethyl] o,o-dimethyl phosphorothioate, an insecticide and acaricide of the organophosphate class, commonly used on alfalfa (seed), citrus, cole crops, cotton, and sugar beets. EPA has concluded that ODM has the potential to adversely affect reproduction and has determined that exposure to ODM may pose risks of concern to applicators and mixers/loaders who use products containing ODM. Accordingly, the Agency has concluded that products containing ODM meet or exceed the criteria for initiation of Special Review set forth in 40 CFR 154.7(a)(2) and that a Special Review of these products is appropriate to determine whether additional regulatory actions are required.

**DATE:** Comments, evidence to rebut the presumptions in this Notice, and other relevant information must be received on or before January 4, 1987.

**ADDRESS:** Submit three copies of written comments, bearing the document control number "OPP 30000/55," by mail to: Information Services Section, Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

In person, bring comments to: Room 236, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment concerning this Notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public docket. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. All non-CBI written comments, will be available for public inspection in Room

236 at the Virginia address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

### FOR FURTHER INFORMATION CONTACT:

By mail: Joanna J. Dizikes, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Office location and telephone number: Room 1006, CM #2 1921 Jefferson Davis Highway, Arlington, VA, (703-557-5096).

For a copy of documents in the public docket, to request information concerning the Special Review, or to request indices to the Special Review public docket, contact Frances Mann (703-557-2805).

### SUPPLEMENTARY INFORMATION:

This Notice is organized into the following units. Unit I is a description of the Agency's Special Review process. Unit II sets forth the regulatory history, to date, of pesticide products containing ODM and describes the basis of the Agency's decision to initiate this Special Review. Unit III provides a use profile and solicits benefit information for products containing ODM. Unit IV sets forth the duty to submit information on adverse effects. Unit V describes the public comment opportunity and the procedures for submission of public comments to the Agency. Unit VI describes the contents of the public docket for this Notice. Unit VII lists the references in support of this action.

During the Special Review, EPA will carefully examine the risks and benefits of using pesticides containing ODM as compared to the risks from alternative pesticides and will determine whether such uses should be cancelled or otherwise regulated. The documents cited as references to Unit VII of this Notice constitute the technical documents in support of this action.

## I. Background

### A. Special Review Process

This Special Review process provides a mechanism to permit public participation in EPA's deliberations prior to issuance of any Notice of Final Determination describing the regulatory action which the Administrator has selected. The Special Review process is described in 40 CFR Part 154, published in the Federal Register of November 27, 1985 (50 FR 49015). During the Special Review process the Agency: (1) Announces and describes the basis for the Agency's finding that use of the pesticide meets one or more of the risk criteria set forth in § 154.7; (2) establishes a public docket; (3) solicits comments from the public regarding whether the use of a pesticide product,

as currently registered or as it is proposed to be registered, satisfies any of the risk criteria for initiation of Special Review set forth at 40 CFR 154.7, whether any risks posed by the use of proposed use of the product that satisfy the risk criteria at 40 CFR 154.7 are unreasonable, taking into account the economic, social, and environmental costs and benefits of the use of the product, and what regulatory action, if any, the Agency should take with respect to the use of the product; and (4) solicits comment from the Secretary of Agriculture and the Scientific Advisory Panel if the Administrator proposes to cancel, deny, or change the classification of the registration of a pesticide product which is the subject of Special Review, or to hold a hearing under FIFRA section 6(b)(2) on whether to take any of those actions. Issuance of this Notice means that potential adverse effects, associated with the use of pesticide products containing ODM, have been identified and will be examined further to determine their extent and whether, when considered together with the benefits of these pesticides, such risks are unreasonable.

## B. Legal Standard and Description

A pesticide product may be sold or distributed in the United States only if it is registered or exempt from registration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (7 U.S.C. 136 *et seq.*). Before a product can be registered it must be shown that it can be used without "unreasonable adverse effects on the environment" [FIFRA section 3(c)(5)], that is, without causing "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of the pesticide" [FIFRA section 2(bb)]. The burden of proving that a pesticide meets this standard for registration is, at all times, on the proponent of initial or continued registration. If at any time the Agency determines that a pesticide no longer meets this standard, the Administrator may cancel this registration under section 6 of FIFRA.

## C. Preliminary Notification

Prior to the public announcement of initiation of a Special Review, pursuant to 40 CFR 154.21, registrants of the affected pesticide are given preliminary notification that the Agency is considering initiating a Special Review. Registrants are given 30 days to respond in writing to dispute the validity of the Agency's conclusions or to present any information in response to the Agency's



risk concerns included in this notification.

Registrants of pesticide products containing ODM were notified by letter, dated July 21, 1987, under 40 CFR 154.21(a), that the Agency was considering initiation of a Special Review on these pesticides (Ref. 1).

## II. Determination to Initiate a Special Review

### A. Regulatory Background of ODM Pesticides

ODM was first registered by Mobay Chemical Corporation in 1961 under the trade name of Metasystox-R. There are 30 registrants of products containing ODM, either as a sole active ingredient or in combination with other chemicals. Currently, there are approximately 38 federally registered products.

#### 1. Data Call-In Requirements.

The Agency has issued five Data Call-In (DCI) Notices on ODM. The first notice was issued in July 1984 to Mobay and Aceto Chemical Company, Inc. and required additional information on existing rat and rabbit teratology and rat reproduction studies (Ref. 2). In response, the Agency received the additional information from Mobay.

The second DCI Notice was issued in February 1985 and required reentry data (Ref. 3). Prior to 1985, a 48-hour reentry interval had been imposed for ODM use, under 40 CFR 170.3(b). Reentry data have been required to determine whether a 48-hour reentry interval is adequate. A protocol for gathering new reentry data has been submitted to the Agency and approved. The reentry data are due in December 1987.

The third DCI Notice, dated April 1986, was sent to Mobay and Aceto. That DCI Notice required exposure data to assess potential exposure to mixers, loaders, and applicators from current, registered ornamental (non-injection) uses (Ref. 4). In that DCI, the Agency also required most of the section 158 data requirements for product, residue, and environmental chemistry, and ecological effects. Mutagenicity and dermal penetration data were also required. In response to the DCI, Mobay chose to delete the ornamental uses from its registrations and conduct the rest of the studies. These data are due from January 1987 (acute LC<sub>50</sub> fresh water invertebrates, submitted) to June 1990. Subsequently, Aceto's ODM registrations were suspended for failure to comply to the DCI.

A dominant lethal mutagenicity test which had been required through the April 1986 DCI Notice was due in April 1987. Mobay did not submit the required

data, and on May 26, 1987, the Agency issued a Notice of Intent To Suspend for non-compliance with the requirements presented in the April 1986 DCI Notice (Ref. 5). Mobay requested a hearing on the suspension notice (Ref. 6). At the time of preparation of this document, the hearing had been stayed, pending settlement negotiations between Mobay and EPA.

The fourth DCI Notice, dated September 1986, was sent to all end-use registrants other than Mobay, requiring the exposure data for ornamental uses (Ref. 7). No end-use registrants have agreed to submit the exposure data. All end-use registrants have either voluntarily cancelled their registrations for non-injection ornamental uses or have allowed them to be suspended for not responding to the DCI Notice.

The fifth DCI Notice, dated June 1987, was sent to all ODM registrants (Ref. 8). Two animal studies on toxicity to the male reproductive system were required by that DCI Notice, one using short-term (acute) dosing and the other using long-term (chronic) dosing. According to that DCI Notice, these data are due October 1988 and December 1987 or October 1988,<sup>1</sup> respectively.

#### 2. Interim Risk Reduction Measures

The Agency is issuing a Registration Standard for all pesticide products containing ODM concurrent with this Notice (Ref. 15). In that Registration Standard, the Agency is announcing that in order to comply with the statutory standard for registration all ODM labels must contain language requiring, among other things, the use of maximum, full body protective methods and that all products containing ODM must be classified for Restricted Use. ODM is being classified for Restricted Use to provide greater assurance that the required label language to mitigate risks is followed. Under the Registration Standard, all ODM product labels must be amended by April 15, 1988, to incorporate these risk reduction measures in order for the registrations to be in compliance with the statutory standard.

#### 3. Regulatory Action by the State of California

A. two-generation reproduction study was submitted by the Agency in December 1985 (Ref. 9). In the Spring of

1986, the California Department of Food and Agriculture (CDFA) notified EPA of its concerns and that it was considering taking further regulatory action on ODM. EPA has questions regarding that reproduction study, and decided not to take any action at that time.

(Afterwards, the Agency's questions were resolved, and the study was upgraded to Core Minimum Data in December 1986; see the discussion in Unit II. B. of this Notice.)

CDFA then took action to regulate ODM in the State of California (Ref. 10). On December 16, 1986, CDFA imposed a number of restrictions on the agricultural uses of ODM, and on December 23, 1986, CDFA suspended all home use products. Restrictions imposed by CDFA for the agricultural uses include: (a) Use only pursuant to a use permit; (b) use only by licensed pest control operators; (c) closed systems; (d) full body protection; (e) enclosed vehicles required for flaggers or, if outside an enclosed vehicle, must have full body protection; (f) no aerial application within 100 ft of flaggers; (g) no greenhouse use; (h) required distribution of an information document to users; and (i) requirements for cleaning or discarding protective equipment.

In addition, CDFA required Mobay to develop four additional studies. These studies and the dates they are due to be submitted to CDFA are: (i) A male rat reproductive system toxicity study,<sup>2</sup> due December 1987 (Ref. 11); (ii) a repeat two-generation rat reproduction study, due Fall 1988 (Ref. 12); (iii) a comparison between oral and dermal cholinesterase dose responses, due December 1987 (Ref. 13); and (iv) a monkey dermal absorption study, due September 1987 (Ref. 14).

The risk reduction measures included in EPA's Registration Standard are similar to those imposed by California, and the classification of ODM as a Restricted Use pesticide will make ODM products unavailable for home use by applicators who have not received training in the proper handling of pesticides.

#### B. Initiation of Special Review on ODM Pesticides

Based on a review and evaluation of the available data, the Agency is initiating a Special Review on all uses of pesticide products containing ODM, primarily based on concerns regarding reproductive effects. The Agency has

<sup>1</sup> The male reproductive system toxicity study was already being conducted by Mobay for CDFA when the Agency required that study in its June 1987 DCI Notice. If that on-going study is used to fulfill the requirement, the final report must be submitted to the Agency by December 1987. If a new study is undertaken, the final report must be submitted to the Agency by October 1988.

<sup>2</sup> This long-term dosing study can be used to fulfill the requirement imposed by the Agency in its June 1987 Data Call-In Notice.



determined that exposure to ODM may result in adverse reproductive effects in humans, and that these effects are of concern because of the potential exposures to applicators, mixers, loaders, and fieldworkers, resulting from the use of products containing ODM.

The Agency believes that currently registered uses of ODM may result in human exposure at levels equating to risks that meet or exceed the criteria for initiation of Special Review set forth in 40 CFR 154.7(a)(2). That criterion states, in part, that "The Administrator may conduct a Special Review of a pesticide use if he determines, based on a validated test or other significant evidence, that the use of the pesticide \* \* \* may pose a risk of inducing in humans \* \* \* heritable genetic, \* \* \* fetotoxic, reproductive effect, or a chronic or delayed toxic effect, which risk is of concern in terms of either the degree of risk to individual humans or the number of humans at some risk \* \* \*."

#### 1. Toxicity—a. Reproductive Effects

The Agency reviewed data primarily from two studies that raised substantial concerns regarding potential reproductive effects resulting from exposure to ODM. The data, submitted by Mobay Chemical Corporation, include the two-generation rat reproduction study, received in December 1985 and later classified by the Agency as Core Minimum (Ref. 9), and interim progress reports of the ongoing male rat reproductive toxicity study originally required by CDFA (Ref. 11). The observed effects include decreases in the female fertility index, testicular weight, litter size, pup weight, and pup survivability. Also, histopathologic changes in the epididymis and alterations in sperm morphology and motility have been found.

i. *Two-Generation Reproduction Study* (Ref. 9). In this two-generation (2 litters in each generation) reproduction study, rats were fed with 0, 1, 10, or 50 parts per million (ppm) of ODM in the diet. At the 50 ppm dosage level, decreases were noted in parental body weight, fertility index, litter size, parental testis weights, and pup weight, as well as increased pup mortality. Further, vacuolization of the epithelial cells in the corpus area of the epididymis was noted in 10/10 males examined.

At the 10 ppm dosage level, decreased parental body weights and testis weight, and increased pup mortality were demonstrated. Vacuolization of the epithelial cells in the corpus area of the

epididymis were observed in 1/10 males examined.

At the 1 ppm dosage level, no effects on fertility, pup body weight, and pup survivability were found. A significant decrease in absolute testis weight was noted in F<sub>1</sub> parental animals. The biological significance of that finding is not known because the testis weight in this group was higher than that of the historical control range and approximated that of the F<sub>0</sub> parental control group. Histopathologic changes of the epididymis were not found.

Based upon these findings, a reproductive no-observed-effect-level (NOEL) was established at 1 ppm, and the lowest-observed-effect-level (LOEL) was established at 10 ppm. However, after 2 days in the diet, approximately 20 percent of the ODM degraded; therefore, the NOEL and LOEL may be somewhat lower.

ii. *Male Reproductive System Toxicity Study* (Ref. 11). Mobay has submitted three of four progress reports on the male reproductive system toxicity study (male fertility study) in rats exposed to 3, 9, and 50 ppm of ODM in the diet. The Agency has reviewed three reports (exposure to ODM for 2, 4, and 6 months).

In the 2-month interim report, vacuolization of the epididymis was reported in 10/10 males exposed to 50 ppm of ODM in the diet. After 4 months of exposure, vacuolization of the epididymis was still evident in all animals of the 50 ppm dose group with a higher grading of severity. Further, 5/9 animals in the 9 ppm group were described with minimal or slight vacuolization in the body of the epididymis after being treated for 4 months. Some animals in the 50 ppm dose group were put on the control diet after being treated for 4 months. In that recovery group, vacuolization was still present in all animals, but the investigators reported that "the severity of the vacuolization was decreased in the mid and distal portion of the body of the epididymis".

After being exposed to ODM in the diet for 2 months, male rats in all dosage groups showed significant increases in the percent of sperm with bent flagella. Significant differences were not found after 4 months, but a higher incidence was still evident in the 3 ppm, 9 ppm, and recovery group.

Vacuolization of the corpus epididymis was previously observed in the two-generation rat reproduction study (Ref. 9), affecting 1/10 and 10/10 animals fed with 10 and 50 ppm, respectively. The same finding was observed in the male reproductive study

at the 2-month interval and affecting 10/10 animals in the 50 ppm group. After 4 months of exposure, there was an increase in the severity of the vacuolization in all 50 ppm males. Further, vacuolization was also observed in 5/9 males in the 9 ppm group. These findings confirmed that vacuolization of the epididymis was compound-related and the severity of the lesion was a function of the length of exposure. In the recovery group, vacuolization was still evident in all animals. The latter suggested that, at least at the 50 ppm dosage level, the epididymal lesion induced by ODM did not reverse completely after 2 weeks of recovery.

The 6-month progress report also confirmed that vacuolization of the corpus epididymis was treatment-related. The severity of the lesion may be a function of the length of exposure, as evidenced by the presence of unilateral or bilateral fine vacuolization in the epididymal head observed in 7/9 animals in the 50 ppm dose group. One animal in the 9 ppm dose group had epididymal lesion after 6 months of exposure to ODM, a finding similar to that found in the 50 ppm dose group. The 6-month recovery group (animals treated with ODM for 4 months at 50 ppm, followed by 2 months on the control diet) still exhibited lesions in the proximal epididymes. Thus, complete reversibility of the epididymal lesions has not been demonstrated in any of the recovery groups (4 and 6-months interim reports).

iii. *Response to the preliminary notification* (Ref. 19). The only comments received by the Agency in response to its preliminary notification of possible Special Review action, were from Mobay Chemical Corporation, presently the sole manufacturer in the United States. Mobay indicated that, based on a new, ongoing, two generation rat reproduction study, the NOEL should be 9 ppm, instead of 1 ppm. [The NOEL of 1 ppm was previously established by the Agency, based on the two-generation rat reproduction study (Core Minimum) completed in 1985, Ref. 9.] The decision to establish a new NOEL, however, must await the completion of this two-generation rat reproduction study currently in progress. Moreover, histopathologic changes in the epididymis, which were found at 10 and 50 ppm in the 1985 two-generation study, have been confirmed at 9 and 50 ppm by interim results from the ongoing, male rat reproductive system toxicity study (Ref. 11).



b. Other Toxicological Effects of Concern—i. Oncogenicity and Mutagenicity

The submitted oncogenicity data are inadequate and preclude assessment of the oncogenic potential of ODM. However, the possible mutagenic potential of ODM may contribute to the observed reproductive effects because there may be a relationship between mutagenicity and adverse reproductive effects. The Agency emphasizes that the potential for mutagenesis in the male reproductive system to produce reproductive effects may range from reduced normal sperm production to paternally-mediated effects on offspring. A positive mutagenic effect of ODM has been demonstrated in gene mutation assays; sufficient data are available to indicate that ODM produces a dose-dependent increase in mutation frequency in *Salmonella* in the presence and absence of metabolic activation. In the mouse lymphoma forward mutation assay, a concentration-dependent increase in mutation frequency is also observed in both the presence and absence of metabolic activation. The effects of ODM on chromosomal aberration and DNA damage are inconclusive.

ii. *Toxicity and poisoning incidents.* ODM is a potent cholinesterase inhibitor. The effects of ODM on human cholinesterase activity were investigated by the University of Kansas (Ref. 16). Human volunteers were exposed to either a single, oral dose or repeated oral doses for 60 days. The dosage levels for the single oral dose ranged from 0.0125 to 1.5 mg/kg (one volunteer per dose level), and the dosage levels for repeated exposure were from 0.05 to 0.4 mg/kg (one volunteer per dose level).

Single, oral doses of ODM up to and including 0.5 mg/kg did not produce any change in either the plasma or red blood cell (RBC) cholinesterase activity. At 1.0 and 1.5 mg/kg, plasma and RBC cholinesterase activities were decreased.

Oral administration of a dosage level of 0.05 mg/kg/day for up to 60 days were without noticeable effects on human blood cholinesterase activities. Inhibition of plasma and RBC cholinesterase activities were found in individuals administered any dose higher than 0.05 mg/kg/day.

In humans, the cholinesterase NOEL's after single and repeated oral administration were established at 0.5 mg/kg/day and 0.05 mg/kg/day, respectively.

In a 90-day feeding study in rats, the cholinesterase and systemic NOELs

were found to be 1 ppm (0.05 mg/kg/day) (Ref. 17). Administration of 10 ppm (0.5 mg/kg/day) in the diet resulted in a significant decrease in the mean corpuscular volume (females) and a significant increased incidence of histopathologic changes in the lungs of males. At the 100 ppm dosage level, significant alterations in hematology, clinical chemistry parameters, absolute and relative organ weights, as well as histopathologic changes in the lungs of both males and females were found. Plasma, erythrocyte, and brain cholinesterase activities were significantly and biologically decreased at the 10 and 100 ppm dosage levels.

The Pesticide Incident Monitoring System (PIMS) files show 67 incident reports involving ODM from 1966 to August 1978, the period for which records are available (Ref. 18). The effects include fifteen reports that cite the involvement of ODM alone. Fifty-two reports cite ODM in combination with other pesticides.

Based on data obtained from California, the only State which enforces mandatory reporting of occupational pesticide incidents, 14 illnesses involving ODM were reported for the period 1981 through 1985. During that time, physicians treated an average of 1.8 ODM poisonings per year, and an additional one case per year was reported from either skin or eye injury. Of these 14 illnesses, 7 occurred to applicators, 3 were from exposure to residues or drift, 2 occurred to mixer/loaders, and 2 were from "other causes." In addition, between 1981 and 1985 four people were reported hospitalized for occupational ODM poisoning for a total of 10 days, and 11 workers were off work for a total of 54 days. No accidental deaths from ODM were reported in California from 1965 to 1977 or from 1981 to 1985 when all accidental deaths from pesticides were reported.

2. Worker Exposure—a. Surrogate Data

The Agency estimated the exposure to individuals using ODM with various application equipment. These estimates were based on surrogate exposure data where "normal" work attire was worn (short or long sleeved shirt and long pants) and the only protective clothes/equipment used were protective gloves during mixing and loading. However, it should be noted that the Registration Standard now being issued lists as a requirement for compliance with the statutory standard the use of full body protective clothing. ODM labels have not, up to now, required specific protective clothing or equipment to be worn. Currently, the labels only require

"appropriate" protective clothing for early reentry.

Using that surrogate exposure data, daily dermal exposure estimates are highest for combined mixing, loading, and applying ODM by airblast to citrus, 2.6 mg/kg/day. It was assumed that ODM is applied to citrus for 8.5 hours/day, one application/year over 2 consecutive days.

Ground boom applications to representative vegetable, field crops, and grapes result in generally the same estimated daily exposures, about 0.5 to 2.0 mg/kg/day, when the surrogate exposure data are used. For these calculations, it was assumed that ODM is applied to:

- Broccoli and cauliflower for 6.7 hours/day, one day/application, usually two applications/yr.
- Cabbage for 3.7 hours/day, one application/yr. for one day outside CA (average of 2 applications/yr. in CA).
- Sugar beets for 8 hours/day, one day/application, usually two applications/yr.
- Grapes for 6.2 hours/day, one day/application, usually two applications/yr.
- Cotton for 6.6 hours/day, four days/application, usually two applications/yr. (i.e. 8 days/yr.).

For those crops where an average of two applications are made per year, the label permits these applications to occur as necessary or in some cases the intervals are specified as 10 to 14 days apart; however, these applications may occur at greater intervals.

Exposure estimates for pilots from aerial application to some of these same representative crops are lower, about 0.02 to 0.09 mg/kg/day (assuming approx. 2 to 2.3 hours/day, two applications/yr.).

The ornamental uses may result in exposure estimates from about 0.04 to 0.6 mg/kg/day (commercial: 1 hour/day, 2 applications/yr., 1 day/application; domestic: 10 to 30 min./day, six applications/yr.).

b. ODM-Specific Data.

The CDFA (California Department of Food and Agriculture) provided the Agency with exposure estimates, specific for use of ODM in California on cole crops (broccoli, cauliflower, cabbage, and Brussels sprouts) (Ref. 18). CDFA has conducted an exposure study to determine the effectiveness of the measures taken independently by California to regulate ODM [requiring the use of full body protection ("rainsuits") and closed mixing/loading systems]. According to CDFA, these measures may result in dermal exposure of 1 to 2 mg per tractor driver per seven-



hour shift, for treatment to cole crops. However, these dermal exposure estimates may apply only to California because the climate in the ODM use areas of California is conducive to such protective measures, and California has a more comprehensive surveillance program, compared to other states.

Although most users are probably exposed to ODM a few days per year, CDFA cites that in California, professional applicators may perform repeated applications of ODM. Therefore, those users could have very frequent exposures to ODM.

### 3. Dietary Exposure

There are 38 tolerances for ODM, ranging from 0.01 to 12.5 ppm, as shown in the following Table 1:

TABLE 1.—TOLERANCES FOR OXYDEMOTON-METHYL

Crop	Tolerance (ppm)
Apples.....	1.00
Apricots.....	0.50
Beans, lima.....	0.50
Beans, snap.....	0.50
Blackberries.....	2.00
Broccoli.....	1.00
Brussels sprouts.....	1.00
Cabbage, sauerkraut.....	1.00
Cauliflower.....	1.00
Corn, all types.....	0.50
Cottonseed (oil).....	0.10
Cucumbers, including pickles.....	1.00
Filberts.....	0.05
Grapefruit.....	1.00
Grapes, including raisins.....	0.10
Lemons.....	1.00
Lettuce.....	2.00
Meat, red.....	0.01
Melons.....	0.30
Milk and dairy products.....	0.01
Onions, dry bulb.....	0.05
Oranges.....	1.00
Pears.....	0.30

TABLE 1.—TOLERANCES FOR OXYDEMOTON-METHYL—Continued

Crop	Tolerance (ppm)
Peas.....	0.30
Peppers.....	0.75
Plums, including prunes.....	1.00
Potatoes.....	0.10
Pumpkin, including squash.....	0.30
Raspberries.....	2.00
Safflower.....	1.00
Sorghum.....	0.75
Strawberries.....	2.00
Sugar, cane and beet.....	0.30
Summer squash.....	1.00
Turnips.....	0.30
Turnip greens.....	2.00
Walnuts.....	0.30
Mint.....	12.50

A comparison of published tolerances to the Reference Dose (RfD) was conducted using the TAS Routine Chronic Analysis. Based on a reproductive NOEL of 1 ppm (0.05 mg/kg/day), from the rat two-generation reproduction study, the RfD is calculated to be 0.0005 mg/kg/day with a safety factor of 100. The Theoretical Maximum Residue Contribution (TMRC) for the U.S. population is 0.005 mg/kg/day. Therefore, existing published tolerances occupy 1010 percent of the RfD. The majority of the TMRC was contributed by fresh apples and juice, orange juice, stone fruits, cereal grains, legume vegetables, and milk.

Because the TMRC was calculated on the basis of tolerance levels, the exposure estimates provided by the TMRC may greatly overestimate dietary exposure. Data reflecting actual residues may result in a lower estimate of dietary exposure.

Furthermore, the residue data submitted to support the tolerances may

not reflect registered use. For apples, apricots, grapes, and plums, ODM is registered for use only on trees that will not bear fruit within the following 12 months. However, residue data submitted to support the tolerance for apples does not reflect that restriction on use. Therefore, the residue data used for apples, a great contributor to the TMRC, does not reflect the fact that ODM is not used on apples in a way that would result in such high residues. (Tolerance data are insufficient for apricots and plums/prunes.) Data are not available on any carryover of residues in trees to its fruit.

In addition, the percentage of the commodity that is treated is not factored into the TMRC, and the effect of processing on residues is not considered. Processing may further reduce estimated residue levels.

Actual crop residue data and processing studies for potatoes, sugar beets, grapes, corn, and cottonseed are required to be submitted by April 1988. Also, metabolism studies in plants, ruminants, and poultry are required (due October 1987).

### 4. Mixer/Loader and Applicator Risks

Margins-of-safety (MOSs) were calculated for worker exposure using both the Agency's surrogate exposure estimates and the ODM exposure estimates given to the Agency by CDFA. All MOSs resulting from both the surrogate exposure data and the ODM exposure data assume a reproductive effects NOEL = 0.05 mg/kg/day, a 70 kg person, and 50 percent dermal absorption. (Dermal absorption data indicate that absorption of ODM is approximately 50 percent.)

The surrogate exposure data were used to calculate MOSs two different ways under the following Table 2:

TABLE 2.—WORKER DERMAL EXPOSURE TO ODM AND MARGIN-OF-SAFETY (MOS) <sup>1</sup> USING BOTH DAILY SURROGATE EXPOSURE ESTIMATES AND AVERAGING SURROGATE EXPOSURE ESTIMATES OVER A YEAR

Method of application	Crop	Daily exposure <sup>2</sup> (mg/kg/day)	MOS <sup>3</sup>	Ave. exposure <sup>2</sup> (mg/kg/day)	MOS <sup>4</sup>
Airblast					
Mixer/Loader.....	Citrus.....	0.10	<1		
Applicator.....		2.5	<1		
Combined.....		2.6	<1	.014	8
Ground Boom					
Mixer/Loader.....	Broccoli/cauliflower.....	0.59-0.83	<1		
Applicator.....		0.27-0.35	<1		
Combined.....		0.86-1.2	<1	.005-.007	12-18
Ground Boom					
Mixer/Loader.....	Cabbage.....	0.44	<1		
Applicator.....		0.19	<1		
Combined.....		0.63	<1	.002	45



TABLE 2.—WORKER DERMAL EXPOSURE TO ODM AND MARGIN-OF-SAFETY (MOS) <sup>1</sup> USING BOTH DAILY SURROGATE EXPOSURE ESTIMATES AND AVERAGING SURROGATE EXPOSURE ESTIMATES OVER A YEAR—Continued

Method of application	Crop	Daily exposure <sup>2</sup> (mg/kg/day)	MOS <sup>3</sup>	Ave. exposure <sup>2</sup> (mg/kg/day)	MOS <sup>4</sup>
Ground Boom					
Mixer/Loader.....	Sugar Beets.....	0.71-1.4	<1		
Applicator.....		0.32-0.63	<1		
Combined.....		1.0-2.0	<1	.005-.010	8-18
Ground Boom					
Mixer/Loader.....	Grapes.....	0.29-0.43	<1		
Applicator.....		0.17-0.25	<1		
Combined.....		0.46-0.68	<1	.002-.004	23-45
Ground Boom					
Mixer/Loader.....	Cotton.....	0.65-0.87	<1		
Applicator.....		0.26-0.35	<1		
Combined.....		0.91-1.2	<1	.020-.027	4-5
Aerial					
Mixer/Loader.....	Broccoli.....	0.029-0.038	2.6-3.4		
Pilot.....		0.008-0.011	9-13		
Aerial					
Mixer/Loader.....	Cauliflower.....	0.017-0.023	4-6	.0005 <sup>5</sup> -.00003	2975 <sup>5</sup> -179
Pilot.....		0.005-0.007	14-20		
Aerial					
Mixer/Loader.....	Cotton.....	0.063-0.084	1-2		
Pilot.....		0.010-0.013	8-10		
Hand-Held Sprayers—Domestic/Commercial	Ornamentals.....	0.04-0.56	<3	.001-.003	30-89

<sup>1</sup> All MOS reflect the NOEL=0.05 mg/kg/day for reproductive effects and a dermal absorption rate of approximately 50 percent (These MOSs might increase, roughly 10-fold, if maximum, full body protective clothing and/or equipment could be used.)

<sup>2</sup> All surrogate exposure estimates assume the use of protective gloves only during mixing/loading (normal work attire) and, approximately, a 70 kg body weight.

<sup>3</sup> These MOSs were calculated by comparing the exposure from a single day to the NOEL.

<sup>4</sup> These MOSs were calculated by comparing the average daily exposure over a year to the NOEL.

<sup>5</sup> Daily exposures from aerial applications to broccoli, cauliflower, and cotton were combined and averaged over a year, and that number was compared to the NOEL to give the resulting MOSs.

Daily exposure, expressed as mean or range, was compared directly to the NOEL (in mg/kg/day) observed in the two-generation rat reproduction study to derive MOSs, and average exposure was calculated by multiplying daily exposure by the number of days per year of use and then dividing that number by 365. This number was then compared to the NOEL from the two-generation rat reproduction study to calculate the MOSs. The MOSs given in Table 2 might increase, roughly 10-fold, if maximum, full body protective clothing and/or equipment is used to reduce exposure.

Two methods for calculating MOSs were used because the two-generation rat reproduction study (from which the NOEL=0.05 mg/kg/day was derived) used a longer term dosing regimen, and ODM is applied only a few times per year in the majority of cases. Therefore, most users of ODM have acute, not chronic, exposures. As a result, the MOSs given in Tables 2 and 3 for daily exposures (which result when the daily exposure is compared directly to the NOEL) may overestimate risks for acute exposures. However, the MOSs which result when exposure is averaged over a year do not necessarily represent the

MOSs that might result from actual studies of short-term exposure. Both sets of MOSs are presented here in order to give a general picture of the uncertainty involved in comparing short-term exposures to results of longer term studies. The Agency recognizes that neither set of MOSs may actually represent the risks being encountered by mixers, loaders, and applicators.

At this time, the Agency does not have appropriate data to characterize the risks associated with short-term exposure to ODM. In its June 1987 DCI Notice, the Agency required a study to be generated and submitted to the Agency which is designed to evaluate the toxic effects resulting from short-term exposure to ODM. That study is required to be submitted to the Agency by October 1988.

As cited in Unit II. A. 2. of this Notice, the ODM Registration Standard states that in order for a product to comply with the statutory standard for registrability, its label must require that maximum, full body protective methods be employed when using ODM. Use of such methods may reduce risks up to 10-fold. Adoption of these measures is prudent given the potentially low MOSs which may be inherent in the use of this

chemical. These measures provide the maximum practical amount of protection while information addressing the uncertainties in the risk characterization is being developed. Analysis following receipt of the additional required data may indicate that the MOSs resulting from the adoption of these risk reduction measures are acceptable and that no further regulatory action is warranted. However, because data needed to refine the risk assessment are currently being developed, the Agency may not be able to issue a preliminary regulatory decision on ODM before June 1989.

The Agency is concerned that multiple exposures to ODM do occur to some mixers/loaders/applicators, as has been reported to occur in California. However, the Agency needs more definitive information on the length of time each day and the number of days per year that mixers/loaders/applicators are exposed. Assuming the exposure is best modelled by chronic toxicity studies, the MOSs given in the first column (daily exposure) of Table 2 and those shown in Table 3 may best reflect the risks posed to these applicators.



TABLE 3.—WORKER DERMAL EXPOSURE TO ODM AND MARGIN-OF-SAFETY (MOS) <sup>1</sup> USING ODM-SPECIFIC EXPOSURE ESTIMATES FROM CALIFORNIA FOR APPLICATION TO COLE CROPS

Method of Application	Crop	Daily exposure <sup>2</sup> mg/kg/day	MOS <sup>3</sup>
Ground Boom—Mixer/Loader Applicator.....	Cole crops.....	0.014 to .028.....	4-8

<sup>1</sup> MOSs reflect the NOEL = 0.05 mg/kg/day for reproductive effects and a dermal absorption rate of 50 percent.

<sup>2</sup> Assuming CDFA's dermal exposure estimate of 1 to 2 mg/tractor driver/seven-hour shift, resulting from those restrictions which are currently required by California (maximum, full body protection, including closed loading systems), and a 70 kg body weight, daily exposure would be 0.014 to 0.028 mg/kg/day.

<sup>3</sup> MOSs were calculated by comparing the exposure from a single day to the NOEL.

The Agency is seeking better information on these exposure patterns in order to better characterize the risks to this group of workers.

Potential reversibility of the reproductive effects is an issue in assessing the risk from toxic effects of ODM. Pertinent aspects include whether or not the effects observed are fully reversible and the time required for complete reversal of effects.

Reversibility of effects on the male reproductive system depends on whether the affected cell type(s) are replaceable. Effects on spermatogenesis or epididymal function may be reversible, but damage to spermatogonial stem cells or Sertoli cells may prolong or preclude recovery. Also, with a mutagenic agent, a paternally-mediated effect on offspring is possible. Demonstration of full reversibility should not be a factor with longer-term exposures or with intermittent exposures when the interval between exposures is insufficient for full recovery.

The question of whether any adverse effects to the male reproductive system are reversible may be answered when the completed male reproductive system toxicity study (male fertility study, Ref. 11) is submitted. That study is also required through the June 1987 DCI Notice, and it is due to be submitted to the Agency by either December 1987 or October 1988. (The male reproductive system toxicity study was already being conducted by Mobay for CDFA when the Agency required that study in its June 1987 DCI Notice. If that on-going study is used to fulfill the requirement, the final report must be submitted to the Agency by December 1987. If a new study is undertaken, the final report must be submitted to the Agency by October 1988.)

### III. Use Profile and Benefits Information

The benefits which may result from the use of a pesticide are not considered when the Agency is determining whether to initiate a Special Review on a pesticide. The criteria for initiating a Special Review, set forth in 40 CFR

154.7, are based on the determination of possible risk to health and/or the environment, resulting from the use of a pesticide. However, in the Special Review, the Agency conducts a thorough assessment of both risks and benefits. The following use profile was prepared for ODM pesticides to aid the Agency in conducting any necessary benefits analysis and to give commenters an overview of the ODM use patterns under review.

#### A. Use Profile of ODM Pesticides

Approximately two-thirds of all the ODM used in the United States, about 165,500 lbs. active ingredient (a.i.), were used in California in 1985 (the first year that reporting was mandatory), and about 132,000 lbs. a.i. were used in California in 1984. CDFA reported that ODM was applied to 46 crops in California in 1984. Major uses of ODM in California are on broccoli, cauliflower, and sugar beets. Outside California, the major uses include cotton, citrus, and alfalfa (seed crop). The following Table 4 shows the estimated acre treatments in the United States by site in 1984, both in California and outside California.

TABLE 4.—ESTIMATED ACRES TREATED BY CROP WITH OXYDEMETON-METHYL IN CALIFORNIA AND ALL OTHER STATES (1984)

Site	Acre treatments
	California (1984)
Alfalfa.....	906
Apples.....	615
Beans.....	4,509
Beets.....	474
Broccoli.....	69,698
Brussel sprouts.....	9,872
Cabbage.....	13,643
Cauliflower.....	59,286
Cherries.....	26
Clover.....	1,644
Conifers.....	15,128
Corn.....	1,305
Cotton.....	10,350
Cucumber.....	4,336

TABLE 4.—ESTIMATED ACRES TREATED BY CROP WITH OXYDEMETON-METHYL IN CALIFORNIA AND ALL OTHER STATES (1984)—Continued

Site	Acre treatments
Deciduous ornamentals.....	91
Eggplant.....	60
Flowers.....	828
Forest.....	294
Grapes.....	16,601
Lettuce.....	3,617
Melons.....	16,918
Nectarines.....	38
Onions.....	330
Oranges.....	17
Ornamentals.....	1,313
Peppers:	
Bell.....	3,946
Chili.....	1,218
Plums.....	19
Potato.....	366
Prune.....	10
Pumpkin.....	443
Sorghum.....	2,308
Squash.....	2,358
Strawberries.....	2,429
Sugar beets.....	21,813
Turf.....	4,343
Walnut.....	1,167
Watermelons.....	5,616
Other.....	NA
Total California.....	277,835

#### All other states (1984)

Sorghum.....	5,000-8,000
Corn.....	5,000-10,000
Cotton.....	10,000-12,000
Alfalfa.....	5,000-10,000
Sugar beets.....	2,000-4,000
Citrus.....	10,000-25,000
Ornamentals.....	NA
Tree fruits.....	2,000-4,000
Nuts.....	2,000-4,000
Strawberries.....	2,000-4,000
Assorted vegetables.....	2,000
Home & Garden.....	NA
	45,000-83,000
Grand total of acre treatments in the U.S.....	322,835-360,835

The Agency briefly reviewed the seven major agricultural crops treated with ODM: Broccoli, cauliflower; Brussels sprouts; cabbage, sugar beets;



grapes; and cotton. The percentage of the crop treated was calculated for these seven crops and for the commodities

which contribute the most to the TMRC. (See Unit II.B.3 of this Notice.) That

information is presented in the following Table 5:

TABLE 5.—SELECTED CROP SITES TREATED WITH OXYDEMETON-METHYL (1983/1984)

	lb ai	Acre treatments	Number of application	Acres treated	Acres grown	Percent crop treated
<b>Broccoli:</b>						
CA .....	34,826	69,698	2(1-3)	34,849	95,700	36
Other States .....	<1,000	<2,000	2(1-3)	<1,000	<10,100	<10
Total US .....	<35,826	<71,698	2(1-3)	<35,849	<105,800	34
<b>Cauliflower:</b>						
CA .....	28,594	59,286	2(1-3)	29,643	46,200	64
Other States .....	<1,000	<2,000	2(1-3)	<1,000	14,800	<7
Total US .....	<29,594	<61,286	2(1-3)	<30,643	61,000	50
<b>Brussels Sprouts <sup>1</sup>:</b>						
CA .....	5,409	9,872	2(1-3)	4,936	5,936	83
Total US .....					6,134	
<b>Cabbage <sup>1</sup>:</b>						
CA .....	7,862	13,643	2(1-3)	6,822	7,118	96
Other States .....	<1,000	<2,000	1(1-3)	<2,000	83,242	<2.4
Total US .....	<8,862	<15,643		<8,822	90,360	<9.8
<b>Sugar Beets:</b>						
CA .....	13,107	21,813	2(1-6)	10,907	211x10 <sup>3</sup>	5
Other States .....	1,500	3,000	2(1-6)	1,500	911x10 <sup>3</sup>	<1
Total US .....	(1-2000)	(2-4000)				
	14,607	24,813	2(1-6)	12,407	1122x10 <sup>3</sup>	<1
<b>Grapes <sup>1</sup>:</b>						
CA .....	11,154	16,601	2(1-2)	8,301	756,720	1.1
Other States .....					118,276	
Total US .....					874,996	0.9
<b>Cotton:</b>						
CA .....	3,975	10,350	2(1-3)	5,175	1,410x10 <sup>3</sup>	<1
Other States .....	11,000	11,000	2	5,500	9,735x10 <sup>3</sup>	<0.1
Total US .....	14,975	21,350		10,675	11,145x10 <sup>3</sup>	<0.1
<b>Corn:</b>						
CA .....	500	1,305	1	1,305	570x10 <sup>3</sup>	0.2
Other States .....	3,750	7,500	1	7,500	79,864x10 <sup>3</sup>	0.01
Total US .....	4,250	8,805	1	8,805	80,434x10 <sup>3</sup>	0.01
<b>Cucumbers <sup>1</sup>:</b>						
CA .....	1,951	4,336	1(1-2)	4,336	7,179	60
Other States .....	<1,000	<2,000	1(1-2)	<2,000	106,670	<2
Total US .....	<2,951	<6,336	1(1-2)	<6,336	113,849	<6
<b>Citrus:</b>						
Grapefruit/Oranges						
CA (oranges) .....	4	17	1(1-2)	17	172,192	
Other States (citrus) .....	7,500	17,500	1(1-2)	17,500	1,159,896	
Total USA .....	7,504	17,517	1(1-2)	17,517	1,332,088	2
<b>Lettuce:</b>						
CA .....	1,597	3,617	1(1-3)	3,617	154,500	2
Other States .....	<1,000	<2,000	1(1-3)	<2,000	74,680	<3
Total USA .....	<2,597	<5,617	1(1-3)	<5,617	229,180	<3

Apples—Information not available.

Sugarcane—Not Registered.

<sup>1</sup> 1982 Census data of acreage grown.

NOTE (1): Numbers in ( ) indicate ranges.

NOTE (2): The symbol .... indicates that the information is not available.

The figures given in Tables 4 and 5 reflect usage prior to 1985 and, therefore, do not reflect effects from any regulatory actions that have been taken on ODM since then.

For broccoli, Brussels sprouts, cabbage, and cauliflower, ODM is registered to control aphids. For all four crops, state recommendations included multiple alternative insecticides, including mevinphos (an alternative

which is more acutely toxic than ODM). These four crops require extensive hand labor.

Of the fourteen major cotton producing states, only one, Arizona, lists ODM for use on cotton for aphid control. Arizona also lists five alternative insecticides.

Seven states produce 99 percent of the grape harvest. ODM is registered to control aphids and mites on grapes with

a one year pre-harvest interval. None of these seven states recommends ODM use on grapes.

ODM is registered for aphid, leafhopper, and mite control on sugarbeets. Eight states produce 97 percent of the Nation's sugarbeets. Three states make no recommendations for the control of aphids, leafhoppers, or mites. Of those states which recommend a pesticide to control aphids and



leafhoppers on sugarbeets, ODM is recommended most frequently, followed by the alternatives phorate, aldicarb, parathion, diazinon, carbaryl, and naled (in descending order of frequency). None of the states recommends ODM for mite control.

#### B. Benefits/Use Information

The Agency is soliciting the information described below to support its assessment of the benefits of ODM and the economic impact of regulatory action on ODM. The Agency also encourages the submission of benefits data on all registered agricultural and non-agricultural uses. However, the Agency especially encourages the submission of benefits data on those selected crop sites presented in Table 5. In the absence of benefits information for a use site, the Agency may conclude that the benefits are negligible for that site.

The user community, other government agencies, and the interested public are encouraged to submit data to support any benefits claims on all registered uses. Persons who desire to submit benefits information should provide any or all of the following kinds of information for each use addressed, along with any other information they believe relevant and desire to include.

#### 1. Repeated Annual Use Information

The Agency is particularly soliciting any information regarding the repeated use of ODM (i.e. users who may use ODM more than a few days a year, either on a single crop or multiple crops). The following data should be included for each applicator: (a) The range of days and average number of days per year spraying ODM (include mixing and loading time); (b) the range of days and average number of days per year applying ODM; and (c) the largest, smallest, and average interval between applications of ODM.

#### 2. Comparative Efficacy Reports

The Agency is requesting all relevant field test results comparing ODM with possible chemical and nonchemical alternatives at recommended or reduced dosage rates and methods of application or implementation. All data will be accepted. However, field tests, in order to be useful, should preferably not be over ten years old and include:

a. In the case of agricultural uses, data relating to evaluation of pest population reduction, reduction of damage or injury, and impact on yield and/or quality (using current agricultural practices, plot designs, and statistical analyses) that compare ODM with possible alternatives.

b. Growing conditions and other pertinent factors that impact on the results of agricultural use.

c. Data on nontarget organisms (e.g., predators, parasites, pathogens, etc., including introduced or endemic species) that are affected by ODM and other pesticides or pest management programs being tested (e.g., integrated pest management data [IPM]).

d. Information on the development of resistance by target pests to ODM or its alternatives.

e. Information of the pest spectrum controlled by ODM and its alternatives, including identification of primary and secondary pests. Also, information is needed on pest biology, ecology, and relationship to crop development and relationship to the spray schedule, as well as information on survey and detection methods and economic threshold.

f. Data on methods and equipment used for pesticide application.

#### 3. Pesticide Profile and Economics Information

The Agency is requesting additional information concerning pesticide use practices, including the following:

a. Data on pesticide or pest management program characteristics that determine the choice of pesticides or other control strategies including their restrictions, limitations, and benefits in agricultural and industrial uses.

b. Pest management programs currently used by growers (or other users) and any other research programs which could modify pest management practices within the next several years.

c. For each use site addressed, discuss representative use patterns of ODM and any alternatives, preferably by target pest(s). Relate this to the particular use pattern or site in terms of acres treated, number of applications per season, formulations, pounds of active ingredient (quantities expressed by State or region are preferable to national totals). Indicate application intervals and any State re-entry intervals which differ from the label.

d. Actual application rate(s) (individual amount or a range where appropriate) in terms of active ingredient per acre or unit in agricultural or industrial uses.

e. Retail cost of ODM and alternatives in terms of dollars per pound of active ingredient or dollars per unit of formulated product.

f. Economic profile of current users of ODM and of "downstream" processors potentially affected by price or supply shifts of the crop or manufactured product or commodity in question.

g. Enterprise or crop budget data (costs and returns) for the typical user.

h. Price elasticity of demand (raw commodity and at the retail/consumer level) for the crop or manufactured product or commodity in question.

i. Information on crop or manufactured product or commodity exports and imports that has a bearing on the regulatory decision.

#### IV. Duty to Submit Information on Adverse Effects

Registrants are required by section 6(a)(2) of FIFRA to submit any additional information regarding unreasonable adverse effects on man or the environment which comes to their attention at any time. For further information on this requirement consult the Agency's enforcement policy for section 6(a)(2), published in the *Federal Register* of July 12, 1979 (44 FR 40716). The registrants of ODM pesticide products must submit immediately published or unpublished information, studies, reports, analyses, or reanalyses regarding adverse effects associated with these pesticides, their impurities, metabolites and degradation products in humans or animal species, and claimed or verified accidents to humans, domestic animals, or wildlife which have not been previously submitted to EPA. These data must be submitted with a cover letter specifically identifying the information as being submitted under section 6(a)(2) of FIFRA. In light of this Special Review and the requirements of FIFRA section 6(a)(2), the registrants must notify EPA of the results of any studies on ODM pesticides currently in progress to the extent specified in the section 6(a)(2) enforcement policy cited above. Specifically, information on any adverse toxicological effects of ODM pesticides, their impurities, metabolites, and degradation products must be submitted.

#### V. Public Comment Opportunity

All registrants and applicants for registration have been notified by certified mail of the Special Review being initiated on their ODM pesticide products. The Agency is providing a 90-day period to comment on this Notice. Comments must be submitted by January 4, 1987. The Agency invites all interested persons to submit further information concerning the risks and benefits associated with the use of ODM, as discussed in this Notice. All interested persons are also invited to comment on whether the use of ODM satisfies any of the risk criteria listed at 40 CFR 154.7, whether risks posed by the use of ODM are unreasonable, and



what, if any, regulatory action should be taken by the Agency. All comments and information should be submitted in triplicate to the address given in this Notice under ADDRESS to facilitate the work of EPA and others interested in inspecting them. The comments and information should bear the identifying notation OPP-30000/55.

During the comment period, interested members of the public or registrants may request a meeting to discuss factual information available to the Agency, to present any factual information, to respond to presentations by other persons, or to discuss what regulatory actions should be taken regarding ODM. Persons interested in arranging such meeting should contact the person listed in this Notice under **FOR FURTHER INFORMATION CONTACT**.

#### VI. Public Docket

The Agency has established a public docket [OPP-30000/55] for the Special Review on ODM. This public docket includes or will include: (1) The preliminary notification to the registrants concerning the ODM Special Review; (2) all written comments and materials (other than claimed confidential business information) submitted to the Agency in response to the preliminary notification; (3) this Notice of Special Review and all documents specifically referenced herein; (4) the Notice of Preliminary Determination and Notice of Final Determination concerning the ODM Special Review and all documents specifically referenced therein; (5) all written comments or other materials (other than claimed confidential business information) concerning the ODM Special Review submitted to the Agency by any person or party outside of government; (6) all documents or other written materials concerning the ODM Special Review provided by the Agency to any person or party outside

of government; (7) a memorandum describing each meeting concerning the ODM Special Review between Agency personnel and any person or party outside of government; (8) any written response to the Notice of Preliminary Determination by the Secretary of Agriculture or the FIFRA Scientific Advisory Panel; (9) a transcript of all public meetings held by the Scientific Advisory Panel or the Agency concerning the ODM Special Review; and (10) a current index of all materials in the docket. All such materials will be available for public inspection and copying at Room 236, Crystal Mall Building #2, 1921 Jefferson Davis Highway, Arlington, VA. from 8 a.m. to 4 p.m. Monday through Friday, excluding legal holidays. The Agency will also distribute a compendium of indices for new materials in Special Review dockets by mail, on a monthly basis, to those members of the public who have specifically requested such material. To request inclusion on this mailing list, contact Frances Mann, (703-557-2805).

#### VII. References

The following list of references includes all documents cited in this Notice. These documents are part of the public docket for this Special Review (docket number OPP-30000/55). The Agency will continue to supplement the public docket with additional information as it is received.

The record includes the following information:

- (1) EPA. Preliminary Notification Letter (July 21, 1987).
- (2) EPA. Data-Call-In Notice for Oxydemeton-methyl (July 1984).
- (3) EPA. Data-Call-In Notice for Oxydemeton-methyl (February 1985).
- (4) EPA. Data-Call-In Notice for Oxydemeton-methyl (April 1986).
- (5) EPA. Notice of Intent to Suspend (May 26, 1987).

(6) Mobay Chemical Corp. Letter to Bessie Hammel, Hearing Clerk: Request for a Hearing (June 30, 1987).

(7) EPA. Data-Call-In Notice for Oxydemeton-methyl (September 1986).

(8) EPA. Data-Call-In Notice for Oxydemeton-methyl (June 1987).

(9) Kroetlinger, F., Kaliner, G., "Two-Generation Study with Rats: R2170 (c.n. Oxydemeton-methyl)". Unpublished report prepared by Bayer AG (1985).

(10) California Department of Food and Agriculture. Notice of action on oxydemeton-methyl (December 1986).

(11) Mobay Chemical Corp. Male Rat Reproductive System Toxicity Study (due December 1987).

(12) Mobay Chemical Corp. Repeat Two-Generation Rat Reproduction Study (due Fall 1988).

(13) Mobay Chemical Corp. Comparison between oral and dermal cholinesterase dose responses (due December 1987).

(14) Mobay Chemical Corp. Monkey dermal absorption study (due September 1987).

(15) EPA. Registration Standard for pesticide products containing oxydemeton-methyl (1987).

(16) Doull, J., Cross, R., Arnold, J., et al., "Effects of Metasystox-\* on Human Plasma and RBC Cholinesterase Activity", Report No. 35525 (1947). Unpublished study received June 18, 1975 under 5F1644; prepared by the University of Kansas Medical Center and Truman Medical Research Laboratory, submitted by Mobay Chemical Corp., Kansas City, Mo., CDL: 094451-Z.

(17) Kroetlinger, Janda. "Subchronic Toxicity Study on Rats (3-month feeding experiment): (Oxydemeton-methyl, the Active Ingredient of R Metasystox-R\*)". Report No. 12797. Unpublished study prepared by Bayer AG.

(18) EPA. Pesticide incident monitoring report on oxydemeton-methyl (1987).

(19) Mobay Chemical Corp. Response to Preliminary Notification of Possible Special Review (August 1987).

Dated: September 30, 1987.

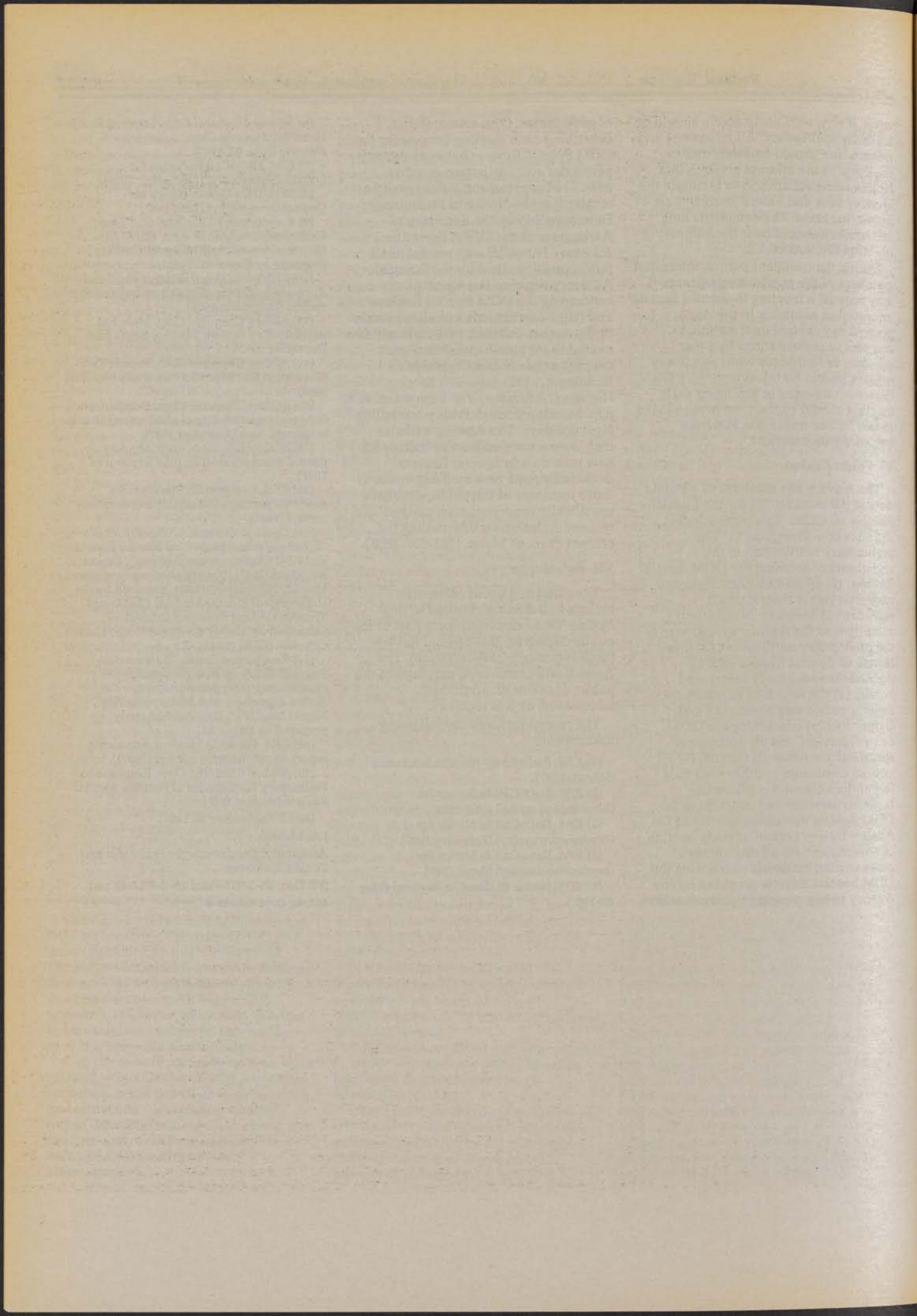
J.A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

[FR Doc. 87-22919 Filed 10-2-87; 8:45 am]

BILLING CODE 6560-50-M







# Register

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Monday  
October 5, 1987

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## Part III

### Department of Education

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34 CFR Part 251

Formula Grants; Local Educational  
Agencies and Tribal Schools; Notice of  
Proposed Rulemaking



## DEPARTMENT OF EDUCATION

## 34 CFR Part 251

## Formula Grants; Local Educational Agencies and Tribal Schools

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the regulations to govern the eligibility of school children to be counted as "Indian" or "Alaska Native" under the Part A Formula Grants Program of the Indian Education Act. The proposed amendments are designed to clarify what documentation is necessary to establish eligibility and what effect failure to collect and maintain that documentation has on the grantee.

**DATE:** Comments must be received on or before November 19, 1987.

**ADDRESSES:** All comments concerning these proposed regulations should be addressed to Mr. Hakim Khan, Acting Director, Indian Education Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue SW., Room 2177 (Mail Stop 6267), Washington, DC 20202. Telephone (202) 732-1887.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

**FOR FURTHER INFORMATION CONTACT:** Mr. Hakim Khan. Telephone (202) 732-1887.

**SUPPLEMENTARY INFORMATION:** Under Part A of the Indian Education Act (the Act), Congress has made provision for local educational agencies and tribal schools to receive formula grant payments to support supplemental educational programs for "Indian" school children. The clear intent of Congress is that a local educational agency or a tribal school should be able to receive Part A funds for any Indian child who meets the statutory definition of "Indian." (section 453(a) of the Act). Under section 453(c) of the Act, Congress has charged the Department of Education with the responsibility of ensuring that there is documentation that children are eligible to be counted to generate funds under this program, before payment is made to the participating school districts. Currently, this documentation is provided through completion of ED Form 506, which must be kept on file by the school district for each student counted to generate funds

under Part A. Under section 1149(a) of the Education Amendments of 1978, the Department of Education must review annually no less than one-third of the recipient school districts for compliance with Part A requirements, including the requirement that a certification form be maintained for each child counted under Part A.

## Declining Documentation

Recent program review reports have shown a significant and continuing decline, as reflected on ED Form 506, in the extent to which school districts maintain complete documentation on students counted by the school districts under Part A. Forty percent of the projects reviewed and funded for the fiscal year 1982 grant period maintained complete eligibility information, while 23 percent and 15 percent, respectively, of the projects for fiscal year 1983 and fiscal year 1984 maintained complete eligibility information. Consequently, the Department is issuing these proposed regulations to assist school districts in meeting the Part A requirements.

## Intent of Rulemaking

The intent of these proposed amendments to the regulations is not to restrict or eliminate any eligible Indian child from being counted to generate funds under this program. On the contrary, the proposed changes are designed to assist school districts in meeting the Part A requirements by clarifying and simplifying the steps the school district must take to complete the documentation process. The Department proposes to accomplish this by including as many valid forms of documentation as are possible within the statutory requirements and based upon commonly accepted sources of historical identification, tribal and governmental recognition, and official validation of Indian ancestry. See § 251.51. The notable exception is the absence of documentation such as a birth certificate which of itself does not prove a child's status as Indian.

The result of these amendments would be to provide a broad range of sources of documentation that should meet not only the letter, but also the spirit of the law. ED Form 506 would be revised to reflect these amendments. The proposed revised form, which is published as Appendix A to this proposed regulation, is included to illustrate the intent of the proposed regulations and to elicit suggestions for further improvements in the form. The revised form will not be codified in the Code of Federal Regulations when the final regulations are published.

## Effective Timetable

The Department has sent letters to all school district superintendents regarding the Department's intent to publish these regulations. It is expected that final regulations will be in place in time to be applicable for fiscal year 1989 awards, for use in the 1989-1990 academic year. The revised ED Form 506 will also be used for the 1989-1990 academic year. Therefore, in the 1989-1990 academic year, completed student certification forms for each child counted in the grantee's application for funds for that academic year will be required, regardless of whether a child is enrolled in the school district at the time of the Department's review of a school district's compliance with the requirements of the Act and its implementing regulations.

## Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

## Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are small school districts or tribal schools receiving Federal financial assistance under this program. The regulations clarify current recordkeeping requirements by listing the types of documentation required to establish eligibility for payments under the law. The regulations also impose penalties for failure to maintain proper records. The recordkeeping requirements are not excessively burdensome or expensive, and the penalties will affect only the limited number of entities found not to be in compliance with the regulations.

## Paperwork Reduction Act of 1980

Sections 251.50, 251.51, and 251.53(a)(2) contain information collection requirements, and § 251.22 adds a new assurance to the application form. As required by section 3504(h) of the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these proposed regulations to the Office of Management and Budget (OMB) for its review.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs,



OMB, Room 3208, New Executive Office Building, Washington, DC 20503;  
Attention: James D. Houser.

#### Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a State and local government coordination and review of proposed Federal financial assistance.

In accordance with the Order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

#### Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. The Department is particularly interested in learning about actual situations where the commenter believes that a child currently eligible to be counted under Part A would be excluded from being counted under Part A were these regulations, as currently proposed, to become final.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 2177, FOB-6, (Mail Stop 6267), 400 Maryland Avenue, SW., Washington, DC 20202 between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, public comment is invited on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

#### List of Subjects in 34 CFR Part 251

Education, Elementary and secondary education, Grant programs—education, Grant programs—Indians, Indians—education, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Number 84.060, Formula Grants—Local Educational Agencies and Tribal Schools)

Dated: September 30, 1987.

William J. Bennett,

Secretary of Education.

The Secretary proposes to amend Part 251 of Title 34 of the Code of Federal Regulations as follows:

#### PART 251—FORMULA GRANTS—LOCAL EDUCATIONAL AGENCIES AND TRIBAL SCHOOLS

1. The authority citation for Part 251 is revised to read as follows:

Authority: 20 U.S.C. 241aa–241ff, unless otherwise noted.

2. Section 251.22 is amended by deleting "and" after paragraph (b)(3)(ix), adding "and" after paragraph (b)(3)(x)(B), and adding a new paragraph (b)(3)(xi) and revising the authority to read as follows:

##### § 251.22 What must an application include?

- (b) \* \* \*
- (3) \* \* \*

(xi) Prior to the LEA's inclusion of a child in a count to generate funds under this part, the LEA has determined that the child is eligible in accordance with § 251.51;

(Authority: 20 U.S.C. 241dd, 1221h)

3. Section 251.50 is revised to read as follows:

##### § 251.50 What are the responsibilities of a grantee regarding student certification?

Before including a student in the count of Indian children to generate funds under this part, a grantee shall determine, at the time the application is submitted to the Secretary—

(a) That the child is enrolled in and receiving free public education in the school district; and

(b) That a completed student certification form that meets the requirements of section 453 of the Indian Education Act and establishes eligibility under § 251.51 is on file for the child.

(Authority: 20 U.S.C. 241bb–241dd, 1221h)

4. A new § 251.51 is added to read as follows:

##### § 251.51 How does a child establish eligibility?

(a) To establish eligibility as an Indian, as defined in 34 CFR 250.4(b), a child must have one of the following:

(1) If applicable, an enrollment number of the child or the parent or grandparent through whom the child claims membership.

(2) If an enrollment number is not applicable, one of the following:

(i) A written certification of membership of the child or the child's parent or grandparent by an authorized representative of the tribe, band, or other organized group of Indians.

(ii) A copy of a tribal voter registration card assigned to the child or the child's parent or grandparent.

(iii) A copy of a tribal membership card assigned to the child or the child's parent or grandparent.

(iv) The tribal census number for the child or the child's parent or grandparent.

(v) A copy of an Indian Health Service Beneficiary Identification Card assigned to the child or the child's parent or grandparent.

(vi) A Certificate of Degree of Indian Blood, issued by the Department of the Interior, that contains information documenting that the child or the child's parent or grandparent is a member of an eligible tribe, band, or other organized group of Indians.

(vii) A certification of an authorized representative of an adoption or foster care agency that, based upon records available to that agency, an adopted or foster child meets the definition of "Indian" in § 250.4(b).

(viii) Evidence that the child or the child's parent or grandparent receives benefits from the State in which that individual resides, based upon the State's determination that that individual is a member of a tribe, band, or other organized group of Indians as the term "Indian" is defined in 34 CFR 250.4(b).

(ix) For a child claiming eligibility as an Eskimo, Aleut, or other Alaska Native, a certification by an authorized official of an Alaskan Native village group (including a regional corporation or village corporation) that the child is a member of the entity in which the child claims membership.

(b) For a child claiming eligibility as an individual recognized to be an Indian by the Secretary of the Interior, the child's eligibility must be established through membership in an Indian tribal entity recognized and eligible to receive services from the United States Bureau of Indian Affairs. A list of Indian tribal entities is published annually by the Department of the Interior in the *Federal Register* (Indian Tribal Entities Recognized and Eligible to Receive Services).

(c)(1) For a child claiming eligibility as an individual who is Eskimo, Aleut, or other Alaska Native, the child's eligibility must be established through membership in a Native entity within the State of Alaska recognized by and eligible to receive services from the United States Bureau of Indian Affairs. A list of Native entities is published annually by the Department of the Interior in the *Federal Register* (Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs).



(2) For the purposes of this paragraph, references in paragraph (a)(2) of this section to "tribe, band, or other organized group of Indians" are to be read as "Eskimo entity, Aleut entity, or other Alaska Native entity."

(Authority: 20 U.S.C. 241bb-241dd, 1221h)

5. A new § 251.52 is added to read as follows:

**§ 251.52 How does the Secretary determine a grantee's compliance with § 251.50?**

Periodically, the Secretary reviews a grantee's records to determine if a student certification form that meets the requirements of section 453 of the Indian Education Act and establishes eligibility under § 251.51 is on file for each child included by the grantee in the count of children to generate funds under this part for the current fiscal year and for prior fiscal years for which the grantee is required to maintain records.

(Authority: 20 U.S.C. 241bb-241dd, 1221h)

6. A new § 251.53 is added to read as follows:

**§ 251.53 What action does the Secretary take if a grantee fails to meet the requirements of § 251.50?**

(a) If the Secretary determines under § 251.52 that a grantee does not have a completed student certification form for each child counted by the grantee to generate funds under this part for the current fiscal year or prior fiscal years for which the grantee is required to maintain records, the grantee must repay to the Department the amount of funds improperly generated. The Secretary may—

(1) Collect the funds awarded for each such child in the fiscal year or years at issue by—

(i) Demanding direct repayment from the grantee;

(ii) Reducing the grantee's current grant award where the Secretary's determination under paragraph (a) of the section concerns the current fiscal year; or

(iii) Offsetting the equivalent amount from the grantee's award for a fiscal year following the determination; and

(2) For one to three years following that determination, require the grantee to submit with its application for funds under this part a verification by an independent auditor that student certification forms have been completed and maintained by the grantee for each child included in the count in the application.

(b) In applying an administrative offset under § 251.53(a)(1)(iii), the Secretary uses the procedures contained in 34 CFR Part 30.

(Authority: 20 U.S.C. 241bb-241dd; 1221h)

**Appendix A**

Note: This form will not be codified in the Code of Federal Regulations.

**Department of Education, Office of Elementary and Secondary Education  
Indian Education Programs  
Washington, DC 20202**

**Indian Student Certification**

See instructions on reverse side.

1. Name of Eligible Child  
Address (Include number, street, city, State and ZIP code).

**Part I—Membership Information**

2. Name of the tribe, band or other organized group of Indians.

3. Who is a member of the tribe, band or other organized group of Indians? Check only one of the boxes and answer the remaining questions for that person.

(a) / / child (b) / / natural  
parent (c) / / natural  
grandparent

If you checked box b or c, enter the name and address of the parent or grandparent:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_

4. The tribe, band or other organized group is (Check only one box):

(a) — Federally recognized (other than Alaska Native)

(b) — Eskimo, Aleut or other Alaska Native

(c) — State and Federally recognized (other than Alaska Native)

(d) — State recognized (indicate State):

(e) — Terminated

(f) — Other than the categories listed in paragraph 4 (a)-(e) of this form. (Explain).

5. Complete "a" or "b".

(a) Where applicable, enter the individual's enrollment number:

(b) Where "a" is not applicable, attach copy of other document(s) verifying membership. (See reverse side for a list of other documents that can be used to verify membership).

6. Name of the organization which maintains membership information:

Address of organization: \_\_\_\_\_

**Part II—School Information**

7. Name of Child's School  
School Address Child's Grade

**Part III—Parent Information**

I certify that this information is correct, and I understand that this form

may be provided to the Title IV, Part A parent committee.

8. Parent Signature \_\_\_\_\_ Date \_\_\_\_\_  
Address, if different from Child.

**Instructions**

In order to receive funds under the formula grant program of Part A of the Indian Education Act, your school district must determine the number of Indian children enrolled in its schools who are eligible to be counted as "Indian" under that Act.

Any child who meets the following definition from the Indian Education Act and for whom the school district has collected this completed form may be counted for this purpose.

"Indian" means "any individual who (1) is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or (2) is considered by the Secretary of the Interior to be an Indian for any purpose, or (3) is an Eskimo or Aleut or other Alaska Native".

You are not required to submit this form to the local educational agency. If you choose not to submit a completed form, however, your school district may not count your child to generate funds under Part A of the Indian Education Act.

Item 5b. Where the enrollment number is not applicable, one of the following documents must be provided:

- A written certification of membership of the child or the child's parent or grandparent by an authorized representative of the tribe, band, or other organized group of Indians.

- A copy of a tribal voter registration card assigned to the child or the child's parent or grandparent.

- A copy of a tribal membership card assigned to the child or the child's parent or grandparent.

- The tribal census number for the child or the child's parent or grandparent.

- A copy of an Indian Health Service Beneficiary Identification Card assigned to the child or the child's parent or grandparent.

- A Certificate of Degree of Indian Blood, issued by the Department of the Interior, that contains information documenting that the child or the child's parent or grandparent is a member of an eligible tribe, band, or other organized group of Indians.

- A certificate of an authorized representative of an adoption or foster care agency that, based upon records



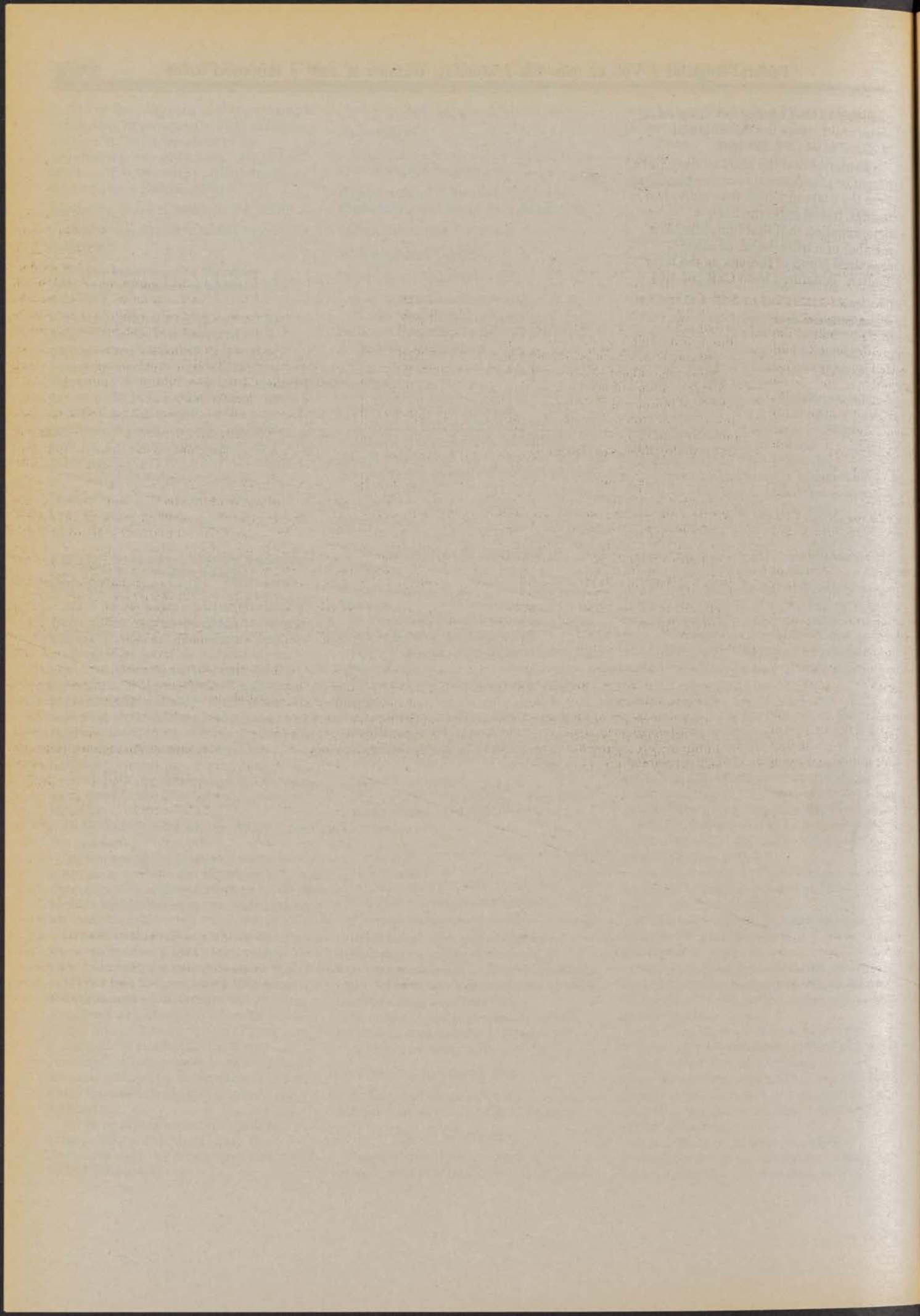
available to that agency, an adopted or foster child meets the definition of "Indian" in 34 CFR 250.4(b).

- Evidence that the child or the child's parent or grandparent receives benefits from the State in which that individual resides, based upon the State's determination that that individual is a member of a tribe, band, or other organized group of Indians as the term "Indian" is defined in 34 CFR 250.4(b).

[FR Doc. 87-22929 Filed 10-2-87; 8:45 am]

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Monday, October 5, 1987

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To provide for the extension of certain programs relating to housing and community development, and for other purposes. (Sept. 30, 1987; 101 Stat. 793; 1 page) Price: \$1.00

## LIST OF PUBLIC LAWS

### Last List October 2, 1987

This is a continuing list of public bills from the current session of Congress which have become Federal laws. The text of laws is not published in the **Federal Register** but may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone 202-275-3030).

### H.J. Res. 362/Pub. L. 100-120

Making continuing appropriations for fiscal year 1988, and for other purposes. (Sept. 30, 1987; 101 Stat. 789; 3 pages) Price: \$1.00

### H.R. 1163/Pub. L. 100-121

To amend section 902(e) of the Federal Aviation Act of 1958 to revise criminal penalties relating to certain aviation reports and records offenses. (Sept. 30, 1987; 101 Stat. 792; 1 page) Price: \$1.00



## CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, prices, and revision dates.

An asterisk (\*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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<sup>2</sup> No amendments to this volume were promulgated during the period Apr. 1, 1980 to March 31, 1987. The CFR volume issued as of Apr. 1, 1980, should be retained.

<sup>3</sup> No amendments to this volume were promulgated during the period July 1, 1985 to June 30, 1986. The CFR volume issued as of July 1, 1985 should be retained.

<sup>4</sup> The July 1, 1985 edition of 32 CFR Parts 1-189 contains a note only for Parts 1-39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1-39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

<sup>5</sup> The July 1, 1985 edition of 41 CFR Chapters 1-100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

<sup>6</sup> No amendments to this volume were promulgated during the period Oct. 1, 1985 to Sept. 30, 1986. The CFR volume issued as of Oct. 1, 1985 should be retained.







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